FOREWORD

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CANAL ZONE SUPREME COURT REPORTS

Volume 1

July Term, 1905, to October Term, 1908

WALTER EMERY
Reporter

ANCON
ISTHMIAN CANAL COMMISSION PRESS
1909

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DENNIS & CO., INC.

Buffalo, N. Y.
May, 1941

Registered Copy No. 26

CANAL ZONE SUPREME COURT REPORTS

VOLUME I

CASES ADJUDGED

IN

THE SUPREME COURT

OF THE

CANAL ZONE

FROM

JULY TERM, 1905, TO OCTOBER TERM, 1908

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JUSTICES

OF THE

SUPREME COURT OF THE CANAL ZONE.

DURING THE TIME OF THESE REPORTS.

FACUNDO MUTIS DURÁN, CHIEF JUSTICE.
HEZEKIAH A. GUDGER, ASSOCIATE JUSTICE.
LORIN C. COLLINS, ASSOCIATE JUSTICE.

J. M. KEEDY, PROSECUTING ATTORNEY (To September 1, 1906.)
G. M. SHONTZ, PROSECUTING ATTORNEY (After September 1, 1906.)
WALTER EMERY, CLERK.
GEO. R. SHANTON, ACTING MARSHAL.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

TABLE OF CASES.

CITED IN OPINIONS.

TABLE OF LAWS.

CITED IN OPINIONS.

(A) Laws of the Canal Zone.

(B) Treaty of Feb. 26, 1904, between U. S. and Panamá.

(C) Civil Code of Panamá.

(D) Judicial Code of Panama

(E) Fiscal Code of Panamá

(F) Miscellaneous.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE CANAL ZONE

JULY TERM, 1905, TO OCTOBER TERM, 1908.

CANAL ZONE *versus* CHRISTIAN.

No. 9. Argued August 7, 1905.—Decided September 1, 1905.

GAMBLING. ACT No. 4 OF LAWS OF THE CANAL ZONE VALID.

The United States, under the treaty with Panamá, was given full power to enact laws for the Canal Zone (Art. 3). The rights and privileges granted by the treaty were free from all prior concessions, etc. (Art. 21). Hence, an act prohibiting gambling within the Canal Zone is valid and in accordance with the treaty, although gambling within the Zone was covered by a concession from the Republic of Panamá, and the concessionaire violated a valid law when he operated a roulette table within the Zone.

Exceptions by defendant from the Circuit Court of the Second Judicial Circuit of the Canal Zone; Hon. Osceola Kyle, Judge.

THE facts appear in the opinion.

Gilbert F. Little, for appellant. *J. M. Keedy* for respondent.

H. A. GUDGER, J. Information was filed in the Circuit Court for the Second Judicial Circuit charging the defendant, Charles Christian, with gambling. Trial was had before the Honorable Osceola Kyle, Judge of said Circuit, who found the defendant guilty in manner and form as charged in the bill of information. A motion for a new trial was made and overruled; judgment was entered on the finding, and

defendant sentenced to pay a fine of one hundred dollars and to be imprisoned for a period of thirty days. From the judgment and sentence of the court, the defendant brings his appeal to this court.

"The Government by its witnesses offered evidence tending to show that the defendant, within twelve months before the filing of the information against him, did engage in the business of gambling for a livelihood, viz., managed and controlled for a profit a game called roulette within the Canal Zone, Isthmus of Panamá, contrary to the statute as made and provided."

"The defendant by his evidence admitted that he did manage and control for a profit a game called roulette as charged in the information; but denied that there was any valid statute or law prohibiting him from engaging in said business."

"It was admitted by counsel for both parties to this cause that defendant was running roulette tables under and by virtue of a concession which had been made and granted by the Republic (Department) of Panamá to Seymour & Pratt, a partnership; and that this defendant as the agent and servant of the said partnership was carrying on the game of roulette."

Several grounds of reversal are urged, but the second assignment of error is all that is necessary for a consideration of the case. It is as follows:

> That Act No. 4 of the Canal Commission, under which this defendant has been arrested, is unauthorized by the treaty or the act of Congress under and by virtue of which the Canal Commission came into existence.

The people living in the territory which had been the Department or State of Panamá, belonging to the Republic of Colombia, declared themselves independent from the mother country November 3, 1903, and held themselves forever absolved from any allegiance to the Republic of Colombia and to be a free and independent nation. The Republic of Panamá was recognized by the United States and other great powers. A treaty was signed between the United States of America and the Republic of Panamá November 18, 1903, and subsequently ratified by the Repub-

lic of Panamá, December 2, 1903, and by the United States Senate February 23, 1904. This treaty, though having for its primary object the construction, maintenance and operation of an interoceanic canal connecting the Atlantic and Pacific oceans, granted to the United States other rights, powers and privileges incident thereto.

Article 2 of said treaty cedes to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal of a width of ten miles, extending to a distance of five miles on each side of the central line of the route of the canal to be constructed. The words granting "in perpetuity the use, occupation and control of a zone of land" to a sovereign power carry with them by implication the right, power and authority to establish and maintain all needful and necessary forms of government.

If there be a doubt as to this view, Article 3 of said treaty is more explicit, and is as follows:

> The Republic of Panamá grants to the United States all the rights, power and authority within the zone mentioned and described in Article 2 of this agreement, and within the limits of all auxiliary lands and waters mentioned and described in Article 2, which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panamá of any such rights, power or authority.

This article of the treaty gives to the United States full power and authority to legislate for the Government of the Canal Zone.

The 21st Article of the treaty further provides:

> The rights and privileges granted by the Republic of Panamá to the United States in the preceding articles are understood to be free from all anterior debts, liens, trusts or liabilities, or concessions or privileges to other Governments, corporations, syndicates or individuals, and consequently, if there should arise any claims on account of the present concessions and privileges or otherwise, the claimants shall resort to the Government of the Republic of Panamá and not to the United States for any indemnity or compromise which may be required.

It was clearly the intention of the high contracting parties,

expressed in unequivocal language, that the United States should have absolute, unqualified and unquestioned control over the zone mentioned, free from any debts, liabilities, concessions or privileges whatsoever.

The concession or the privilege in question was based on the personal covenants of the Republic of Panamá and Seymour & Pratt.

The Court could not construe it so as to prevent or inhibit the free alienation of land, such contracts never taking the nature of contracts that run with the land. Therefore, at common law and entirely independent of the treaty, had the Republic of Panamá been an individual, and a deed been given to some third person of a tract of land embraced within the zone, nothing being expressed about the concession, Seymour & Pratt would have had no right to enter upon said land for any purpose or to carry on gambling thereon. Should a sovereign power take less by conveyance than an individual? None would so contend. Yet in the case at bar there is a special warranty on the part of the Republic of Panamá that the United States should enjoy possession untrammeled and free from concessions, and should exercise the rights, power and authority of a sovereign of the territory.

It is needless to enter into an argument to show that the Republic of Panamá, a sovereign nation, had the right and the power to discontinue at any moment it became necessary any domestic contract made by it or by any other authority which it recognized. The moral right to exercise such a prerogative can hardly be questioned when it is remembered that the Government in the treaty referred to agrees to indemnify any one, suffering damage, against any loss. Besides, it is a well established principle that all governments have the right to expropriate private property for public highways, the construction of railroads, street-car lines, sites for public buildings such as school-houses, court houses, jails, etc., and for other purposes of public utility; and that in so doing they have discharged in full their obligation to the private citizen when they have indemnified him against all loss. The rights of any one deprived of a concession to seek redress from the Republic of Panamá being recognized in the treaty, to it Seymour & Pratt must apply if aggrieved.

The prohibition of gambling within the limits of the Canal Zone was without doubt within the legislative power of the Isthmian Canal Commission, and Act No. 4 is in our opinion legal and valid.

This Act contains several sections, under any of which this defendant might have been tried and, if found guilty, punished. Under Section 6, imprisonment was obligatory, and under Section 2, the punishment was left discretionary with the judge.

It seems that the defendant labored under a mistaken idea that he had certain rights by virtue of the concession named, and that he acted apparently in good faith and for the purpose of testing his legal rights. The question of the legal rights of the defendant could only be determined in case the law was violated. The record leads us to believe that the act complained of was more to refer the question to legal determination than wilfully to violate the law. Therefore, considering all the facts and circumstances as revealed, we are of the opinion that the case comes properly under Section 2 of Act No. 4.

The judgment of the Circuit Court for the Second Judicial Circuit is modified by striking out that part imposing thirty days' imprisonment, and affirming said judgment in every other particular. Let a mandate issue to the court below in conformity with this opinion.

All concur.

Affirmed in part and reversed in part.

CANAL ZONE *versus* MORADO.

No. 11.—Decided January 15, 1906.

APPEAL. NO EXCEPTIONS OR ASSIGNMENTS OF ERROR.

An appeal will be dismissed when there are no exceptions or assignments of error and no questions of law are raised.

Appeal by defendant from the Circuit Court of the Second Judicial Circuit; Hon. H. A. Gudger, Judge.

THE facts appear in the opinion.

J. M. Keedy, Prosecuting Attorney. No appearance for appellant.

LORIN C. COLLINS, J. This was an appeal by the defendant from the findings and judgment of the Circuit Court of the Second Judicial Circuit, the Hon. H. A. Gudger, judge presiding.

An information was filed by the Government against the defendant, charging him in the first count with having committed an assault; and in the second count with an assault with intent to commit rape.

The defendant was duly tried, found guilty on the first count and sentenced to imprisonment in the common jail of the Canal Zone for and during the term of six months. The defendant having prayed an appeal brings his case to this court for review.

On the hearing, the Government by the Hon. J. M. Keedy, Prosecuting Attorney, moved to dismiss the appeal for the reasons that the record shows no exceptions were taken to the rulings of the Court on the admission or rejection of evidence; shows no assignment of errors; and raises no question of law.

The Court has examined the record and finds there is evidence to sustain the conviction, and as every point urged by the Government for dismissal is also sustained by the record, the motion to dismiss is sustained.

It is therefore ordered that said appeal be and is hereby dismissed and that a procedendo do issue to the court below.

CHIEF JUSTICE MUTIS concurs.

Affirmed.

ACHURRA *versus* OLIVARES.

No. 10. Argued January 10, 1906.—Decided February 8, 1906.

CANCELLATION OF CONTRACT. RETURN OF SPECIFIC PROPERTY.

Where the plaintiff prayed for the return of the specific property sold, in a suit for rescission of the contract of sale, a judgment for the value of the

property was held to be error, although the property had been sold by defendant.

Exceptions by defendant from the Circuit Court of the Second Judicial Circuit; Hon. Lorin C. Collins, Judge.

THE facts appear in the opinion.

Francisco Filós, for appellant. *H. Patiño*, for respondent.

H. A. GUDGER, J. This was a civil action tried before His Honor, Lorin C. Collins, sitting as acting judge of the Second Judicial Circuit Court of the Canal Zone. The plaintiff brought suit for the cancellation of a contract of sale of four cows valued in the complaint at $90.00 silver each, and alleged that the said contract had not been fulfilled; and asked for the cancellation of the contract and the return of the specific property sold. Plaintiff admitted that defendant had paid $100.00 silver on said amount, but alleged she was to pay the balance monthly and had failed to do so.

Defendant admitted the contract and price of the cattle, the payment of $100.00 silver, but denied that she was to pay the balance in monthly instalments; but averred, on the contrary, that she was to pay the same in pasturage, etc., of other cattle belonging to the plaintiff and that she had performed her part of the contract.

The question as to defendant's payment as alleged by her was the issue tried by the court, and found in favor of the plaintiff. Judgment was entered by the lower court in favor of the plaintiff, and against the defendant, for the sum of $260.00 silver. Neither the complaint nor any paper in the cause demanded the value of the cattle; and the only demand which was made was for the return of the specific thing, viz., the cattle.

We think, therefore, that the lower court erred in entering judgment for the value of the cattle, the same not having been asked in either the complaint or rejoinder. It appears in the record that the cattle had been sold, either before or after the commencement of the action. It is evident that the plaintiff has rights in the premises; and, as the defendant admits that the cattle have been disposed of, we think it but proper that the Circuit Judge should permit the plaintiff, if

he see proper, to amend the complaint so as to demand judgment for the value of the cattle.

The judgment of the lower court, therefore, is reversed and a new trial granted, with the above suggestions to the Circuit Judge.

CHIEF JUSTICE MUTIS concurs.

Reversed and remanded.

CALDERON *versus* COQUARD.

No. 13. Argued January 15, 1906.—Decided February 8, 1906.

JURISDICTION. TRANSFER FROM COURTS OF PANAMA. WHEN NOT NECESSARY.

In 1897, S. borrowed $400 from H. and gave him a mortgage on her house to secure the debt. S. afterward sold the mortgaged house to defendant. H. died leaving heirs (plaintiffs) who brought suit in a Panamá court to foreclose the mortgage. During the pendency of the suit, the Canal Zone was removed from the jurisdiction of Panamá, but the Panamá court carried the case to final judgment in favor of plaintiff. The Panamá court having no jurisdiction within the Zone, the plaintiff was unable to secure the house adjudged to belong to him, and thereupon brought suit in the courts of the Canal Zone, reciting the above facts and asking that the mortgage be foreclosed. Defendant pleaded to the jurisdiction on the ground that this case is the same as the one pending in the Panamá court and as no transfer had been made as provided in Section 41 of Act No. 1 of the Laws of the Canal Zone, the Zone court has no jurisdiction. HELD, that statement of proceedings in Panamá court is only a recital and not a request for the enforcement of the decree of that court and hence no transfer is necessary. This is a new suit for the foreclosure of a mortgage and contains all necessary allegations for such a suit. There may be only one remedy but suit may be brought in different jurisdictions until remedy is obtained. No relief was secured in Panamá and plaintiff had a right to bring another suit.

Appeal by plaintiff from the Circuit Court of the Second Judicial Circuit; Hon. H. A. Gudger, Judge.

THE facts appear in the opinion.

M. Calderón, for appellant. *G. M. Shontz*, for respondent.

LORIN C. COLLINS, J. A memorial was filed and sum-

mons issued out of the Circuit Court of the Second Judicial Circuit, on the 10th day of July, 1905, against the defendant, summoning him to answer the memorial on or before the first Tuesday in August. The defendant was duly served with process and on his appearance filed a demurrer, which being overruled, he was ordered to answer the memorial. He later filed his plea to the jurisdiction of the court which, being set down for argument, was later sustained by the court, the Honorable H. A. Gudger, judge presiding, and the suit ordered dismissed at complainant's costs.

The plaintiff brings the case to this Court on appeal and asks the reversal of the judgment below, assigning errors.

The complaint filed in the case recites that the plaintiff is a resident of the city of Panamá and comes into court in the character of legal representative of his wife, Magdalena Herrera, and her absent brother, Tomás Herrera, and that by executive order against the defendant, the possessor of a certain house mortgaged for a certain sum in favor of one Don Tomás Herrera, from whom the complainants derived their rights, the said house was sold at public auction and the case adjudicated in plaintiff's favor;

That the said case was commenced before the provisional delineation and acquirement by the United States of the territory of the Canal Zone; that the said case was heard in the Court of the first Judge of the Panamá Circuit, who decided that he should and must continue the case for the reason that his jurisdiction was absolute at the time of the commencement of the suit, and furthermore because the parties thereto voluntarily assented; that no Panamá law has suspended or regulated the jurisdiction of the judges in the strip of land ceded to the United States; that there have been no arrangements adopted by the two Governments for the transfer of jurisdiction from one authority to the other;

That it is true that the new American judges do not regard the Panamanian judges as having any jurisdiction within the Canal Zone, and the complainant has not been able to take possession of the aforesaid house that was adjudged to belong to him by virtue of the decree of sale, the original of which is attached to the complaint;

That to avoid greater loss to his principals, he prays that

the house mortgaged in favor of Don Tomás Herrera, by means of public document No. 42, dated March 6, 1897, be sold at public auction and that the amount of the loan contracted by Señora Suensson be paid to him from the proceeds of the sale, or, if there be no suitable bids, that the mortgaged house be adjudged to the complainant in payment of the amount of the loan, which amount he computes as $1,588.00 Panamanian currency;

That the principal of the debt and interest thereon have not been paid; that to secure the payment of the principal of the debt and the interest, one Señora Suensson granted to Don Tomás Herrera, a first mortgage on a wooden house, described in the complaint, which belonged exclusively to her, and which was situated within the municipal district of Empire, and described in the complaint; that Magdalena and Tomás Herrera are the only and universal heirs of their late father, Don Tomás Herrera, and have a perfect right, according to the Civil Code, to request the sale at public auction of the mortgaged house, and claim an immediate payment of the amount indebted; that the said defendant became the possessor of said house by conveyance subsequent to the mortgage above referred to.

The plea to the jurisdiction alleges:

That on the 22nd day of April, 1904, the present plaintiff commenced an action against this defendant in the First Circuit Court of the Republic of Panamá; that in the complaint filed in said action the said plaintiff alleged and set forth the same material allegations contained in the complaint in this action; that said action was pending in said Court of Panamá at the time the "Laws of the Canal Zone, Isthmus of Panamá, enacted by the Isthmian Canal Commission," were enacted; that by Section 1 of Act No. 1 of said Laws this Court was established; that Section 41 of said Act No. 1 of the Laws of the Canal Zone provides that "The Supreme, Circuit and Municipal Courts (of said Canal Zone), within their respective jurisdiction, shall have the power to hear and determine all cases heretofore arising in the territory of the Canal Zone and now pending in the courts which possessed jurisdiction in and over such territory at the time said suit was instituted and prior to the 26th day of February, 1904; provided jurisdiction over said cases is surrendered and the cases transferred to the courts of the Canal Zone by the courts in which the cases are now pending;" that said Act No. 1 of said Laws of the Canal Zone

was enacted August 16, 1904, which date was subsequent to the time of the commencement of the aforesaid action commenced by the said present plaintiff against the defendant in the aforesaid First Circuit Court of Panamá; that the records in said First Circuit Court of Panamá disclose the fact that judgment was rendered in said Court against this defendant and in favor of the plaintiff herein, on the 13th day of January, A. D. 1905; that said case was never transferred from said Panamá court to any court of the Canal Zone having jurisdiction thereof, and that jurisdiction over the said mentioned case in the Panamá court was never surrendered to any court of the Canal Zone; that the aforesaid case, having been pending in the First Circuit Court of Panamá at the time of the enactment of the aforesaid Act No. 1 of the Laws of the Canal Zone, and jurisdiction over said case never having been surrendered by the Panamá court and said case never having been transferred from said Circuit Court of Panamá to this Court, or any court of the Canal Zone having jurisdiction thereof, this Court, by said Section 41 of Act No. 1 of said Laws of the Canal Zone is without jurisdiction to hear and determine this case; that the plaintiff in said action in said Panamá court, who is the present plaintiff herein, appeared as his own attorney in said Panamá court, even to the rendition of final judgment therein; that he also appears in this Court in the same capacity. All of which matters and things this defendant avers and pleads for the purpose of showing and alleging that this Court is without jurisdiction to hear, try or determine the action herein.

The plea is filed on the theory that the complainant asks for the enforcement of a decree of the First Circuit Court of the Republic of Panamá, and that as the cause had not been transferred to the courts of the Canal Zone, the Circuit Court of the Second Judicial Circuit was without jurisdiction in the premises.

Is this a fact, or is the memorial a bill merely for the foreclosure of a mortgage? An examination of the complaint shows that the statement made in regard to the proceedings in the Panamá court is simply a narration of certain events which took place before the beginning of the suit and which might have been entirely omitted from the memorial; that no request is made for the enforcement by the Courts of the Canal Zone of any order entered by the said Panamanian court. The memorial, after narrating the facts in regard to the proceedings had in the Court of the Republic of Panamá, prays that the house mortgaged, be sold at public auction;

that the amount of the loan be paid with interest; that the principal of the loan, and interest thereon, is due and unpaid; it describes the mortgage with proper words of reference, and attaches a copy to the complaint; it describes the property by metes and bounds; it asserts that, according to the Civil Code of the Canal Zone, the complainants have the right to request the sale of the property at public auction, and to claim the immediate payment of the amount due. There is also attached to the complaint a certificate of the decree finding Magdalena and Tomás Herrera heirs of Don Tomás Herrera; also the marriage certificate of Manuel Calderón and Magdalena Herrera.

The Court finds that every necessary allegation of a bill for the foreclosure of a mortgage on property within the Canal Zone, by a Court of the Canal Zone, is properly pleaded. There is no rule of law that prohibits the bringing of actions in different jurisdictions where the defendant may be found, involving the same subject matter.

The principle governing such cases is, that if full relief can be had in the one suit, no others shall be allowed, and a demurrer lies; but if the prior action is for relief which could not be granted in the action demurred to, this principle does not apply. And a demurrer is not sustained where the other action is pending in a court of the United States, or of a sister State.

1 Boone Code Pleading, page 78.

There can of course be but one satisfaction, but it appears from the memorial in this case, that no benefit whatsoever had been had by the complainants by reason of the institution and termination of the litigation in the Republic of Panamá, and as the Panamanian court ceased to have jurisdiction over the subject matter, the complainant had the right to bring his suit in the Circuit Court of the Canal Zone, in the circuit where the property was situated, and where the Court had ample jurisdiction to do justice between the parties. The judgment of the Circuit Court of the Second Judicial Circuit, in sustaining the said plea and ordering the dismissal of the case at complainant's costs, is reversed and the case remanded for proceedings in conformity with this opinion. The costs of the appeal shall be taxed against the defendant.

CHIEF JUSTICE MUTIS concurred.

Reversed and remanded.

ANDRADE *versus* SEYMOUR *et al.*

No. 12. Argued January 8, 1906.—Decided March 1, 1906.

PLEADING. SWEARING TO ANSWER.

On objection being made that answer was not sworn to by principal defendant, it was held that an answer need not be sworn to.

SAME. STAMPED PAPER.

Stamped paper is not required in the Canal Zone because the law requiring its use is not in force in the Canal Zone.

EVIDENCE. RELEVANCY.

Certain notes were alleged by plaintiff to have been given by him for gambling debts and proof was offered of his gambling habits, and also to show that he had borrowed money of defendant over the gambling table. HELD, that proof was inadmissible as not tending to prove that notes were given for gambling debts.

SAME. OBJECTION TO ADMISSION.

When plaintiff has annexed a contract as an exhibit to his petition, the defendant only can afterward object to its admission as proof on the ground of irregularities in form.

SAME. CONTRACTING PARTY CANNOT ALLEGE NULLITY OF CONTRACT.

Plaintiff offered evidence to prove illegality of the contract. HELD, that a guilty party cannot allege the nullity of an illegal contract into which he has entered voluntarily.

Exceptions by plaintiff from the Circuit Court of the Second Judicial Circuit; Hon. H. A. Gudger, Judge.

THE facts appear in the opinion of Justice Collins.

Oscar Terán, for appellant. *J. M. Keedy*, for respondents.

LORIN C. COLLINS, J. The plaintiff, Antonio Andrade, filed his complaint in the Circuit Court of the Second Judicial Circuit, against John Seymour, James M. Hyatt and J. M. Popham. Afterwards the said plaintiff filed an amended complaint in said Court against the said parties, asking for the cancellation of a certain pretended contract, or memorandum of agreement, entered into by said defendant, John

Seymour, and said plaintiff, Antonio Andrade, on the twenty-first day of July, 1905.

The said complaint alleges that the defendants, being co-partners, conspired together, by tricks and artifices, to defraud and cheat the plaintiff out of a vast amount of property, to the value of $50,000.00, as appears from said pretended contract between the defendant Seymour and the plaintiff, a copy of which is filed with said complaint and made a part thereof; that the execution of said agreement was procured by false representations, prior to its execution, and by fraudulent representation as to what the terms of the contract, and the wording thereof, were; that the plaintiff relied upon the statements of the defendants, and believing the same, and being carried away by the hurry and bustle of the defendant Popham, was induced to sign the contract made a part of the bill of complaint. Plaintiff further alleges that he was not indebted to the defendant Seymour, or to any of the defendants, in any sum. The complaint further alleges that the defendant Seymour was engaged in running a roulette wheel and that the bills mentioned in said complaint are for gambling debts, and not collectible, nor enforceable, in the courts of the Zone; that the plaintiff could not read nor write the Greek, his native tongue, nor read, write or understand English, except by broken, desultory and disconnected words; that he was persuaded to sign his name to a paper which the defendants pretended contained the provisions which he desired, but which in fact did not, and attempted to extort from the plaintiff a vast amount of rum, the product of the plantation of the plaintiff and of which he was the owner; that by reason of divers false and fraudulent representations, plaintiff was induced to sign the pretended contract, and the plaintiff was denied the right of having the contract read to him by some one in whom he had faith; that advantage was taken of a time when plaintiff's attorney was out of town, with intent to cheat and defraud the plaintiff; that the plaintiff does not owe the defendants, or either of them, anything; that the papers held in escrow are simply evidence of a gambling obligation won by defendant Seymour from the plaintiff by means of a crooked and unfair wheel, called roulette wheel, and are without consideration and in violation of law; that the plaintiff

before learning the contents of the illegal contract had shipped to the said defendant Seymour, rum to the value of $1,400.00, and prays for the cancellation of the said contract, and for a judgment against the defendants, and each of them, for the amount of the rum delivered, together with costs and charges.

The contract attached to said complaint, and made by the plaintiff a part thereof, substantially provided that the plaintiff should furnish the defendant Seymour not less than thirty barrels of new rum per month and ten barrels of old rum per month, when the said defendant Seymour might require. And the said plaintiff further offered to furnish to the said defendant Seymour whatever other amount of rum might be required by the defendant Seymour up to the full amount that the plaintiff might have or obtain, or be able to make. The new rum so delivered to be of commonly called "proof 21" and the old rum of not less than "21 proof." The contract to remain in force until twenty-five thousand gallons (25,000) of new rum, and ten thousand (10,000) gallons of old rum had been delivered. All of the rum to be delivered within fifteen months from the 21st day of July, 1905. The defendant Seymour was to pay the said plaintiff $1.00 Panamá silver per gallon for the new rum, and $2.00 Panamá silver per gallon for the old rum. And the said defendant further agreed that he would not sell or dispose of any rum of any kind to any merchant in Colon, or to any one representing them. Payments for the said rum to be made within ninety days after each delivery of the rum, and that sixty barrels of new rum should be delivered at once, which should contain 3,000 gallons, more or less, for which the defendant Seymour agreed to pay cash. The said plaintiff further agreed that he was indebted to the said defendant Seymour upon notes and personal obligations which were to be held in escrow and that the amount of old rum delivered should be applied to the payments of said obligations and upon the completion of said payments, the remainder of the money due upon said old rum should be paid to the plaintiff, the same as the payment for the new rum, 4,000 gallons of the old rum to pay the notes held in escrow.

The defendants filed their joint answer to said complaint

admitting that the defendant Seymour entered into a contract with the plaintiff for the purchase and delivery of rum as stated in said contract, and admit that the prices and payments as set out in said contract were true; that the plaintiff undertook to carry out the terms of the contract and delivered about one-half of the first shipment, and then would deliver no more, and informed the defendants that he would set the contract aside on the ground of fraud, although the defendants urged him to continue under the contract and agreed to pay him in advance; that the agreement was entered into in good faith on their part with the knowledge and assent of the plaintiff, he knowing full well the terms and conditions. They deny all allegations of fraud and misrepresentation, deny that the contract was not read to the said plaintiff, but aver that the contract while being prepared was carefully read to the said plaintiff and he was asked if it was what he wanted, to which he answered "yes." They further allege that the said plaintiff showed the contract to others after it was prepared, who read it, and that the plaintiff said that the contract was all right and would enable him to pay his debts. They deny that the said plaintiff did not know the terms and conditions and allege that he knew the contents and acquiesced therein. They deny that the notes mentioned in the contract were gambling debts, contracted at a gaming table, and aver that the notes were for money loaned by the defendant Seymour, or by his partner (Pratt), and had no reference to, or connection with, gambling, but were cash loans, which the plaintiff agreed in said contract to pay by giving 4,000 gallons of old rum. They further deny all allegations in the complaint of fraud, deceit or misrepresentation, and all allegations in the bill of complaint referring to the debt of the said Andrade contained in the said notes, as being gambling debts.

This cause came on for trial before the Honorable H. A. Gudger, Judge of the Circuit Court of the Second Judicial Circuit, both parties being represented and witnesses were sworn and evidence heard by the court. The Court found the questions of conspiracy, deception and fraud, as well as the question of the debts secured being gambling debts, were

not sustained by the evidence, and that the plaintiff signed the contract, attached to the complaint, of his own free will and accord, and that he had failed to show that the debts secured in said instrument were gambling debts. A motion for a new trial was made and overruled by the Court and judgment entered upon the finding. From said judgment the plaintiff appealed to this Court.

The first exception taken by the plaintiff was to the Court overruling a motion to strike out the answer of the defendants, as the same was not sworn to by the principal defendant, but was sworn to by the defendant Popham. I am of the opinion that the Circuit Court ruled correctly in this motion, as there is no rule, either requiring the principal defendant to swear to the answer, or for an answer to be sworn to under the code of procedure.

The plaintiff also excepted to the following rulings:

"II. The plaintiff asked the witness, Juan Au de Barrios, the following question: 'What are his (Andrade's) habits for gambling?' The defendant objected to the question, the Court sustained the objection, and said: 'The Court will permit questions as to gambling, if they can be connected with the notes in question.' The question before the Court was as to whether or not certain notes, referred to in the contract, were gambling debts, and the question asked the witness had no reference to any of these notes, nor to any fact connected with them. The plaintiff excepted to the ruling of the Court."

"III. The plaintiff introduced one Cosmos Zambetti, who was asked the following question: 'Did you ever see Mr. Seymour loan Mr. Andrade money over the gambling table?' The defendant's attorney objected to the question, and the Court ruled as follows: 'I hold now that at the present the burden of proof is on these gentlemen (referring to the defendants) to show that these were not gambling debts. If you have witnesses to show the exact transaction I will admit them, but not otherwise. If you have any witnesses of the time these notes were given, that is all right, they must show the time and this identical date. I rule out the question.' To this ruling the plaintiff noted an exception."

The ruling of the Court in excluding the question as to the gambling habits of the plaintiff was in conformity with all the rules of evidence, as the gambling habits of the plaintiff

were not under consideration and no light could be thrown by the answer of said question as asked, on the real question at issue whether the notes mentioned in the contract were given for gambling debts. Neither would an answer to the question, whether the witness had ever seen the defendant Seymour loaning plaintiff money over the gambling table throw any light upon the point of issue. Therefore each of these rulings of the lower Court are sustained.

The last exception urged in this Court is as follows:

"IV. The defendant's attorney offered as evidence in the case the contract which is sought to be set aside by the plaintiff, which is referred to in plaintiff's complaint, and a copy of which was filed as a part of said complaint, and about which the plaintiff had in the examination of witnesses asked questions, and about which the subscribing witnesses thereto had without objection given their evidence. The plaintiff excepted to the admission of the contract, assigning as his reasons:

"(1) That the contract is not in form;

"(2) That it is not registered;

"(3) That it is not stamped as required by law.

"In overruling these objections the Court stated: 'The object of this suit is to cancel this contract. How can that be done unless the contract is introduced? Without it there could be no trial of this cause. The Court overrules the objection and the contract is admitted.' The plaintiff excepted to this ruling of the Court."

This exception is not well taken as it appears from the bill of complaint itself, that the contract is made a part of the complaint, and as the plaintiff was asking that the contract should be cancelled, it must of necessity be received in evidence, unless excluded on objection made by the defendants, which was not done; and as the rule of procedure further provided that all documents relied upon shall accompany the petition and of course be considered in evidence, unless objected to by the defendants.

There being no other assignments of error, for the reasons given above, the decision of the Circuit Court of the Second Judicial Circuit, should be affirmed.

F. MUTIS DURÁN, C. J. I concur with Justice Collins in his final decision, but base my opinion to some extent upon different grounds.

Exceptions II and III. Under the code of civil procedure in force in Panamá and in the Canal Zone, indirect evidence is admitted without restriction when it is impossible to obtain direct evidence. During the trial in the lower court, no direct proof was given that the notes in question were gambling notes, and it was therefore proper for the plaintiff to offer indirect testimony as to this point. However, if the plaintiff had been allowed to prove his point, he would have shown that he had signed a contract based upon an illicit consideration, and hence null and void. Article 1742 of the Civil Code provides that he who executed such a contract shall not declare the nullity. The plaintiff would therefore not be allowed to introduce testimony tending to show that he had entered into a null contract, and hence the lower court ruled correctly in excluding this proof. See also Articles 1523, 1524, 1740 and 1741 of the Civil Code and Article 95 of Law 153 of 1887.

Exception IV. The ruling of the lower court on this exception is sustained, not only for the reasons given, but also because the validity of private contracts is not affected by the fact that they are not registered. Nor is stamped paper necessary, because Article 9 of Law 79 of 1904, which makes this requirement regarding stamped paper, is not in force in the Canal Zone, as it applies only to officers of the Government of Panamá.

Affirmed.

SEYMOUR *et al. versus* ANDRADE.

No. 18. Petition filed June 22, 1906.—Decided June 25, 1906.

MANDAMUS. ESSENTIALS OF PETITION.

Must be very explicit, must show well defined right in petitioner and must be made on affidavit.

SAME, WRIT OF. WHEN GRANTED.

Only when usual and ordinary methods of procedure have been exhausted and there is no other remedy; when rights of petitioner are prejudiced; and when there would be a failure of justice if writ were denied.

Petition by defendant for writ of mandamus to Circuit

Court of the Second Judicial Circuit; Hon. H. A. Gudger, Judge.

Defendant in lower court moved to dismiss the plaintiffs' attorneys on the ground that they were the Prosecuting Attorney for the Canal Zone and his assistant. The motion was overruled and the defendant excepted. The Court then ruled that an appeal must be taken immediately and that the case would not proceed until a decision on the exception was rendered by the Supreme Court. Defendant perfected his appeal within the time required. At a later session, the trial judge ruled that the case must proceed in the lower court until final judgment and that the bill of exceptions would not be signed. The petition in this case prays that the trial judge be ordered to sign the bill of exceptions.

Oscar Terán and *T. C. Hinckley*, for defendant and petitioner. No appearance for plaintiff.

LORIN C. COLLINS, J. An action of mandamus is an original suit of a civil nature brought in the name of the state on the relation of one who can show a well-defined right thereto. The petition must be very explicit, giving all the facts and circumstances and must be made on affidavit, as it prays an extraordinary remedy. The writ of mandamus will be granted by a superior court only when the substantial rights of the appellant are prejudiced in the lower court, and only when the appellant is unable to obtain redress in any other way.

In the case at bar there seems to be no substantial injury done the appellant, as the matter of permitting attorneys to practice is at the discretion of the court. Should an attorney object to another's participating in the trial of a case and his objection be overruled by the Court, he may except to the ruling of the court and bring his exception to this court only after final judgment, as is provided by the rules of procedure prescribed by this court. Hence the appellant had not exhausted the usual and ordinary methods of procedure before applying for the writ of mandamus.

The petition in this cause is not verified, does not show that there would be a failure of justice if the writ were

denied, and does not show that all other methods of redress have been pursued without benefit.

Therefore it is considered by the Court that a rule to show cause should be denied, the writ of mandamus be refused and the petition dismissed at petitioner's cost.

The CHIEF JUSTICE concurred.

Writ denied.

BOILLEAU *versus* BARRIL.

No. 20. Argued July 20, 1906.—Decided August 8, 1906.

CONTRACT.

Governed by law of state where made and if good there is good anywhere.

EVIDENCE. PLAINTIFF USING DEFENDANT AS WITNESS.

Party calling other party as witness is bound by the testimony given.

NOVATION.

In a suit on a note which defendant alleges has been cancelled by other notes and he can not produce these notes, other evidence is admissible to prove the cancellation of the first note.

Appeal by defendant from the Circuit Court of the First Judicial Circuit; Hon. F. Mutis Durán, Judge.

The facts appear in the opinion.

J. M. Keedy and *G. M. Shontz*, for appellant. *A. Jesurún, Jr.*, for respondent.

H. A. GUDGER, J. This is a civil action that was tried in the First Judicial Circuit of the Canal Zone. Judgment was given for the plaintiff in the sum of $650.00 United States currency. Motion for a new trial was made and overruled and the defendant appeals and brings the case to this court for review.

At the trial the plaintiff offered in evidence a written agreement to pay $730.00 United States currency in nine monthly consecutive payments, of $80.00 each, of the first

eight payments, and $90.00, the last, commencing said payments on February 1, 1905.

The plaintiff also called the defendant as a witness in his behalf, and he testified that he signed the note in question; that he did not owe the same; that, in the month of April after its execution, he, the defendant, and the plaintiff, at their homes in Easton, Pennsylvania, by mutual consent, agreed to a cancellation and payment of the note in question by the execution, on the part of the defendant, of three separate notes, namely, two for $200.00 each and one for $297.00; that these notes were delivered to, and accepted by, the plaintiff in full payment and cancellation of the note sued on in this action; that, upon said notes as delivered to the plaintiff and accepted by him, the defendant had paid several amounts to the plaintiff, as per agreement, and exhibited two receipts for $25.00 each, signed by the plaintiff, which had been credited upon the larger note; that this agreement, the execution of the notes and acceptance of same, by the plaintiff, occurred in Easton, Pennsylvania; that the notes were in the possession of the plaintiff in the United States and that he had no power to produce the same, and that he had notified the attorney for the plaintiff of this agreement a year ago. The attorney for the plaintiff, at the trial, used the following language: "I admit the honesty and veracity of these receipts of Mr. Boilleau, and although I am not able to compare the signature on these notes with the other signatures, I am willing to admit these payments and change my complaint accordingly." Both of the subscribing witnesses to the note were present in the court below and it was not necessary for the plaintiff to have called the defendant, or used his evidence; but, having done so, he must be bound by the evidence he adduced. Does the evidence of the plaintiff show a payment and discharge of the obligation sued on? It seems clear that the parties to this obligation had a perfect right to enter into any agreement with reference to the same, that might seem to them to be just and proper, without consulting attorneys in the matter.

It is further insisted that the agreement made in Pennsylvania is not a valid contract, or, if valid, cannot be availed

of in this action, unless it can be proved by the production of the paper writing itself, for the reason that, under the laws of Panamá, as set forth in the Colombian Code and enforceable in the Canal Zone, no contract for more than $500.00 can be enforced unless the same is reduced to writing. It is insisted that the obligation sued upon is the only proof in this case that should be considered and that any defense thereto must be proved by a paper writing. Is the defense set up such a contract as comes within the provisions of the statute referred to? Most certainly not. And the court can find no hard and fast law such as that urged in support of this paid obligation. Law 153 of 1887, Articles 91 to 93, inclusive, sufficiently disposes of this contention. The last paragraph of Article 93 provides that—"such cases are also excepted in which it shall have been impossible to obtain written proof, as well as the cases expressly excepted by law." It would be unconscionable and revolting to all sense of justice if payment of an obligation could not be proved by the obligor, or against the obligee. There is, however, a universal rule of law supported and sustained in all civilized countries which disposes, in our opinion, most effectually of this case. This contract having been made in Pennsylvania, must be construed and governed by the laws of Pennsylvania and not by the laws of Panamá and the Canal Zone. It is apparent, from the examination of the record, that it was the understanding of the parties that performance of the contract should take place also in Pennsylvania, from the fact that there is evidence that all of the payments so far made upon the three notes, given in payment of the old obligation, were made at Easton, Pennsylvania, showing that the arrangement of the parties was that payment should there be made. Therefore the universal rule, recognized by the comity of nations that a contract that is good in the place where it is made is good everywhere, unless it is injurious to public rights and morals, or against public policy, must control. Promissory notes, by the laws of Pennsylvania, are negotiable instruments, and if assigned, before maturity, for a valuable consideration to a third person, are not open to any defense on the part of the maker. Therefore, if judgment should be affirmed in this

case and the plaintiff had assigned the three notes before maturity to some one in Pennsylvania, though the defendant should pay the judgment here, he would still be liable upon the notes in the States.

The Court cannot, therefore, sustain a judgment that might prove to be the agency by which a great act of injustice and wrong might be perpetrated. All the credit that has been given to the defendant on his payments was $80.00, and yet it is conclusively proven that $50.00 more had been paid. If, therefore, the defendant cannot receive credit for the $50.00 proved and admitted to have been paid, why might he not lose the whole sum remaining?

We are of the opinion that the testimony introduced in this cause shows that the parties, by mutual consent, made and entered into a new contract and that this contract was about the same subject matter and operated as a payment and cancellation of the obligation sued upon.

The judgment of the court below is reversed and judgment is entered against the appellee for the costs in this action.

JUSTICE COLLINS concurred.

Reversed.

PERRENOUD *et al. versus* SALAS.

No. 14. Argued July 10, 1906.—Decided August 8, 1906.

PUBLIC DEED WITH AGREEMENT OF REDEMPTION.

Cannot be rescinded by a subsequent deed that extends term for redemption and changes the consideration. DISSENT. The two deeds are to be considered together and if the second deed is executed before the expiration of the original term of redemption, the second controls.

SAME. TENDER OF PURCHASE MONEY BY SELLER.

If not made, the deed becomes absolute at expiration of the term of redemption.

Exceptions by plaintiff from the Circuit Court of the Third Judicial Circuit of the Canal Zone; Hon. Lorin C. Collins, Judge.

THE facts appear in the two opinions.

W. H. Carrington, for appellant. No appearance for respondent.

F. MUTIS DURAN, C. J. By public deed of October 21, 1903, Catalina Montes de Perrenoud, duly authorized by her husband, sold to Jacob L. Salas, with an agreement of redemption, two houses belonging to her and situated in what is now Cristobal; the price being $2,800.00 Colombian silver, and the term of redemption ten months after the execution of the deed. Afterward, by public deed dated June 15, 1904, it appeared that the same parties entered into a new contract by which they extended for six months the term of redemption, and raised the price to the sum of $5,000.00, Colombian silver, charging interest at the rate of 3 per cent per month on said amount. According to Title 23, Book 4 of the Civil Code, which refers to contracts of sale, the sale of real estate of October 21, 1903, is a contract that is considered absolute, that is to say, one that can be rescinded but not altered by subsequent contracts, since the parties had agreed upon the thing sold and the price thereof, and the deed had been duly executed before a notary (Art. 1857 of the Civil Code and Art. 681, Judicial Code). The agreement of redemption, according to the Civil Code, is supplementary or collateral to the contract of sale, the seller reserving to himself the right of redeeming the thing, paying the price agreed upon for the redemption, or the price originally given (Art. 1939). The seller in the contract of October 21, 1903, agreed to redeem within ten months, but afterward extended the time six months more. But in the new contract made between the parties, they changed the terms of the principal contract, raising the price of the thing sold and agreeing to pay interest on the total amount, thus making a new contract of loan entirely different from the first one but without rescinding it. So that there were two contradictory contracts about the same thing; this could not be done, according to law. The first contract remained in force.

Although the plaintiff and defendant had agreed that they would voluntarily make the change in the term for redemp-

tion, the defendant said that the plaintiff did not have the money to make the redemption on the day appointed for that purpose, and the plaintiff did not prove at the hearing that she had tendered the money. Therefore, the plaintiff lost the right to redeem and the two houses became the absolute property of the defendant. The decision of the lower court is affirmed.

H. A. GUDGER, J. This cause was tried before his Honor Lorin C. Collins, Judge of the Third Judicial Circuit. Judgment was entered in favor of the defendant. Motion for a new trial and motion overruled.

The plaintiff alleges that he conveyed to the defendant on the 20th day of October, 1903, two houses, the consideration being $2,800.00, Colombian silver, and that said document of conveyance contained a clause of reselling in the following words, namely: "With the express condition that they be resold to me at the expiration of ten months from this date." The proof shows that of this amount, $2,000.00 was actually paid the plaintiff, and $800.00 was added as interest on the amount of $2,000.00 for the ten months embraced in the reselling clause above set forth. Before the expiration of the ten months, the parties entered into a new agreement to the effect that the time of reselling be extended for an additional six months, and the consideration made $5,000.00. This fact is shown in document No. 100 made in the presence of witnesses, a notary public, on stamped paper, and duly acknowledged and registered with all the formalities of law. The proof also shows that the advance from $2,800.00 to $5,000.00 was as follows: Original sum, $2,800.00; paid plaintiff in cash $100.00; and for estimated improvements on the property, $2,100.00; total $5,000.00.

At the expiration of the first period no amount was paid or tendered to the defendant, but instead thereof the new agreement, entered into between the parties as shown in document No. 100, was relied upon by both parties. The condition of this document No. 100, the last executed, is as follows: "That by mutual consent and with our free and deliberate will we have agreed to renew the contract or deed of sale under the legal conditions of reselling to the

original vendor as appears in public instrument No. 125, drawn up in that same Notary with all the legal formalities on the 21st day of October, 1903, subject to the following conditions: First, the term in which the reselling of the premises may be accomplished is hereby extended to another six months besides the time set forth in the above mentioned document so that the said term shall expire on the 21st day of the month of February in the coming year 1904." Then follow in the regular order the other conditions, such as consideration, acknowledgment before a notary, and other formalities required to complete, as a perfect document, this instrument. At the trial both document No. 125 and document No. 100 were introduced by each party as their cause of action and defense, and neither party objected to the consideration of both these documents.

It is seriously contended that the first document (No. 125) was absolute at the expiration of the ten months therein named, and that document No. 100 is null and void for the reason that no payment was made on August 23, 1903, and hence the plaintiff, notwithstanding the extension of the time as set forth in document No. 100 to six months after August 23, 1903, lost all right of redemption or having the property reconveyed to him. In other words, the contention is that document No. 125 is the act of the parties and that the parties had no legal right to make document No. 100 and, therefore, it is null and void. Is this true as a principle of law? Shall we be governed by the first document and treat the second as a nullity? Both these documents seem to be of equal solemnity and the parties, so far as appear, were at each time fully capable of binding themselves. Naturally the enquiry is made, why should not the two documents be construed as one whole and effect be given to them as such. If, indeed, such construction should not be given to them as a whole then why should not the last document, the final act of the parties, be considered as the controlling one as between themselves. It cannot be contended that the last document (No. 100) is not within itself perfect; that it did not at the time reflect the will of the parties; and that it was not made in strict obedience to all the formalities of law. The change, and the only change, between the two was giv-

ing to the plaintiff an additional six months in which to redeem, and increasing the consideration to $5,000.00 in order that needed improvements might be placed on the property itself.

A contract is the mutual agreement voluntarily entered into between contracting parties and may be made in any case where the parties are capable of binding themselves, have control of the subject matter, and such contract is not forbidden by law.

In the case at bar all the requisites for making both document No. 125 and document No. 100 were present. So far as the second document, No. 100, is concerned, it is in exact terms and formalities and on an equal footing in every respect with the first. The question then is, whether or not these parties making the second agreement in due form, can change, enlarge, modify or even abolish one previously made by themselves. As both these documents were offered in evidence by the defendant as well as by the plaintiff, and no objection was made, and no statement in the record is shown to the contrary, it is reasonable to assume that the Judge passed upon them as a whole. In this it is my opinion that he was correct.

The attorney for the plaintiff contends that, taking these documents either separately or together, they constitute a mortgage at least for and during the term of the ten months set forth in the first, and six months set forth in the latter, and that "once a mortgage always a mortgage." He recites many cases and decisions made by the courts of the United States to sustain this view, and calls to his aid the application of the rules of equity. Equity is defined by the law writers to be "the correction of that wherein the law by reason of its universality is deficient." In other words, it signifies, used in a broad sense, "natural justice." It is the power conferred on the courts to do equal and exact justice between contending parties when the facts either admitted or proved show that justice cannot be administered under the stern rules of law. Following the English law and the practice in the United States, there could be but little doubt as to the right of the court in certain matters to give equitable relief. It must be understood, however, that the law as

administered by this court does not admit of equity practice as a separate and distinct branch of jurisprudence. Common law does not exist in the Republic of Panamá, nor are judicial decisions within the Republic of any binding force. (See Article 17, Colombian Code). This article and the rule laid down by the same must be understood to apply only to the decisions of the courts of the Republic of Panamá and not to decisions made by the Supreme Court of the Canal Zone.

Again, the statute regulates such transactions as set forth in the pleadings in this cause, and the statute is mandatory and must be followed. It appears, without contradiction, that neither at the expiration of the ten months, nor at the expiration of the six months, nor, indeed, at any time before the commencement of this suit, did the plaintiff pay or tender to the defendant either the $2,800.00 or the $5,000.00. Failing to do that at the times set forth, he loses *ipso facto* his right, and the defendant has the right *de facto* to take charge of the property for the reason that the statute makes the document, whether you consider No. 125 or No. 100, absolute and irrevocable.

I concur, with His Honor, the Chief Justice, that the judgment of the lower court must be sustained, yet I cannot concur with him that document No. 125 is enforceable and that document No. 100 is null and void. The judgment of the court below is affirmed.

Affirmed.

LAVERGNEAU *versus* JANEL.

No. 15. Argued July 14, 1906. Decided August 16, 1906.

POWER OF ATTORNEY.

A power to represent principal during his absence may be considered as continued or renewed after his return if he acquiesces in acts of the attorney.

SAME. COMPENSATION OF ATTORNEY.

May be fixed by court under advice of experts if the work done is non-judicial.

Appeal by defendant from Circuit Court of the Second Judicial Circuit of the Canal Zone; Hon. H. A. Gudger, Judge.

THE facts appear in the opinion.

Ramón M. Valdés, for appellant. *Oscar Terán*, for respondent.

F. MUTIS DURÁN, C. J. It appears from the evidence that the appellant, Emile Janel, being in poor health, desired to make a trip to Jamaica, and gave a general power of attorney to the respondent to attend to his business during his absence, and put respondent in possession and management of his business. On his return from Jamaica, appellant was still not well and left respondent still in charge of his business, and subsequently went to Costa Rica for his health and remained there for about three months.

The parties not being able to agree upon the compensation to be fixed, suit was brought and the court found that the appellant was indebted to the respondent in the sum of $1,365.00 United States currency, together with the costs of the action. From this judgment appeal was prosecuted.

There are only two points necessary to be considered: as to the amount of the compensation to be allowed; and as to whether the return temporarily of the appellant revoked the power of attorney and deprived respondent of compensation thereafter.

The power of attorney was conferred to represent the appellant in legal matters if it should be necessary, but it does not appear that respondent had represented appellant in that capacity. He acted simply as an agent for the appellant, and therefore the provisions of the Judicial Code which fix the compensation to be allowed agents who act in judicial matters do not apply to this case. The provisions that do apply are those of Title 28, Book 4 of the Civil Code, relating to contracts of mandate (Arts. 2142, 2143, 2149 and 2150).

With respect to the amount of the compensation, the court below fixed it according to Article 2143, following the advice of some of the witnesses who were familiar with the business of the plaintiff. The court finds that the compensation allowed was reasonable.

Referring to the second point mentioned above, it appears from the record that, not only after the return of the defendant from Jamaica, but also after his return from Costa Rica, the plaintiff continued with the acquiescence of the defendant to administer his affairs for about nineteen and a half months in all. According to Article 2149 of the Civil Code, this is considered an implied power of attorney, or a renewal or continuance of the original power. Plaintiff was therefore entitled to compensation for the entire period.

The decision of the court below is affirmed.

JUSTICE COLLINS concurred.

Affirmed.

CALDERÓN *versus* COQUARD.

No. 16. Argued July 14, 1906.—Decided August 16, 1906.

ATTORNEY. POWER OF.

Powers are granted and may also be substituted by public instrument or by memorial addressed to the court.

APPEAL.

An appeal may be taken by the party, by the attorney, or by any person who gives security that his action will be approved by appellant.

APPEAL. NOTICE OF.

To be given within required term after date of judgment and not date when copy of judgment is served on appellant. If notice is not given in time, the trial judge cannot grant the appeal.

CERTIORARI. WRIT OF.

Petitioner perfected his appeal after lapse of term for appealing. Appeal being refused by the trial judge, this petition is brought to compel the granting of the appeal. HELD, that this writ cannot be used as a substitute for an appeal. It is used to complete an imperfect transcript or to complete proceedings when the lower court refuses to do so upon erroneous grounds. Error or injury must be alleged and the petition must show a proper case upon its face.

JUDGMENT.

Notice of rendition of judgment need not be served upon parties.

Petition by plaintiff for a writ of certiorari to the Circuit Court of the Second Judicial Circuit; Hon. H. A. Gudger, Judge.

Judgment against the plaintiff was rendered in the lower court on May 15, 1906, and a copy of the judgment was sent to him in Chorrera, the copy being received on May 20. The plaintiff appointed an attorney who perfected the appeal on May 30, 1906. On objection by attorney for defendant, the lower court refused to grant the appeal.

Oscar Terán, for petitioner. *G. M. Shontz*, for defendant.

LORIN C. COLLINS, J. and F. MUTIS DURÁN, C. J. This cause comes before the Court on an application for a

writ of certiorari to remove from the Circuit Court of the Second Judicial Circuit the above entitled cause. Objection is urged to the petition for a writ of certiorari for the reason that the present attorney for the plaintiff and petitioner is not authorized either to give notice of an appeal in the court below, or to file a petition for a writ of certiorari in this Court.

Under the Judicial Code of Panamá, powers of attorney are conferred by public instrument, or by memorial addressed to the court in which the suit is brought (Arts. 328 and 329, pp. 16 and 17) and may be substituted in the same manner, that is to say, by public instrument or by memorial, although the attorney-in-fact is not specially authorized to make the substitution (Arts. 334 and 335, pp. 18–19). According to the Rules and Regulations of the Courts of the Canal Zone, the authority to appear as an attorney may be given verbally in open court. Although these rules say nothing about the substitution of an attorney, it is clear that the substitution may be made in the same manner, that is, verbally, or by writing, provided it be addressed to the Court. Appeals, according to the laws of Panamá, may be made by the parties themselves, or by their attorneys-in-fact, and, in urgent or special cases, by any person appearing for the appellant, if that person gives security that the person for whom he acts will approve his action (Art. 345, Judicial Code, which is in conformity with Art. 1506 of the Civil Code). The objection is not sustained.

However, the petition is insufficient in any view of the law, for the following reasons: It is not alleged that any injury has been done by denying the appeal, nor does it appear that in the decision, or in the proceedings in the court below there was any error or injury done. It does not appear from the petition that, although the plaintiff, at that time Manuel Calderón, agent, was absent from the Canal Zone and the City of Panamá on the day of the rendition of the final judgment, he was not informed of the rendition of said judgment in ample time to have taken an appeal in accordance with the rules of the courts of the Canal Zone; the averment being merely that a copy of the judgment was forwarded to the plaintiff in the town of Chorrera, Republic of Panamá,

and did not reach the hands of the plaintiff until the 20th of May, 1906. He might, notwithstanding, have known that judgment had been rendered although he had not seen the formal copy of the judgment.

It also appears from the petition that after some talk with the trial judge between the 21st and 29th days of May last, a notice of appeal was filed with the clerk of the court of the Second Judicial Circuit on May 29th. On May 30th the plaintiff in person appeared before the trial judge of the Second Judicial Circuit and signed an appeal bond, which was approved. Two days thereafter, a motion was filed in court by the defendant asking that said order granting an appeal be set aside. At the hearing of said motion on the 5th day of June, said motion was sustained and the order allowing an appeal vacated. There is nothing in the rules or practice of the courts of the Canal Zone that requires personal service on a party, or on his attorney, of the rendition of judgment, the rules providing that the appellant shall give notice of appeal on the day final judgment is entered, or within five days thereafter. This rule, although its operation is in this case severe, deprives the trial judge of any right to grant an appeal after the five days have expired.

Let us now consider the case in the view contended for by the attorney for the appellant, which is that judgment is not final, for the purpose of appeal, until the party against which it operates, is notified thereof. The appellant knew on the 20th day of May, 1906, that final judgment had been rendered against him. There is no suggestion in the petition that there was any extension of time asked for or granted by the trial judge, and yet, it was not until the 29th day of May that the notice of appeal was filed with the clerk of the lower court. The contention made by the appellant in argument was that the time in which the appeal should be prayed must date from the notification to the party affected by the rendition of final judgment. Even assuming such a contention to be the law, notice of appeal was not given in time.

"The writ of certiorari does not lie to enable the court to revise a decision upon matters of fact; nor matters resting in the discretion of the judge of an inferior court, unless by

special statutes, or where palpable injustice has been done. It does not lie where the errors are formal merely, and not substantial, nor where substantial justice has been done though the proceedings were informal; nor where the proceedings are not void on their face and show no arbitrary action on the part of the trial judge." "Certiorari will not lie as a substitute for an appeal from an interlocutory order of a superior court." "The evidence cannot be reviewed upon certiorari, nor the rulings on the admission of evidence." "It is granted or refused in the discretion of the superior court." "The application must disclose a proper case upon its face." "The judgment is either that the proceedings below be quashed or that they be affirmed, either wholly or in part." Bouvier's Law Dictionary, Rawle's Revision.

It will be seen from the above citations that a writ of certiorari could not be issued in this case, its province being "in most of the States of the United States to remove from the lower court proceedings which are created and regulated by statute merely for the purpose of revision and to complete the proceedings when the lower court refuses to do so upon erroneous grounds." "It is used also as an auxiliary process to obtain a full return to other process, as when, for example, the record of an inferior court is brought before a superior court by appeal, writ of error, or other lawful mode and there is manifest defect or suggestion of diminution, to obtain a perfect transcript and all papers." "It is true that in many States, by reason of statutes, and in the Federal courts under acts of Congress, a writ of certiorari is authorized to issue to bring up the records of that court for its revision and determination." Bouvier's Law Dictionary.

The above principles are those relating to the writ of certiorari under the American law and must be applied, as the writ referred to in Sections 9 and 24 of Act No. 1 of the Laws of the Canal Zone is a common law writ.

Under the laws of Panamá, the writ of certiorari (recurso de hecho) is governed by the provisions of Chapter 2, Title 7, Book 2 of the Judicial Code, and may be applied for when an appeal has been denied in a judicial proceeding. The aggrieved party applies to the superior court which grants the appeal and decides it, if it is legal. The provisions of that

chapter must, however, be complied with, and in the present case this has not been done. The petition for a writ of certiorari is denied and the petition dismissed at the cost of the petitioner.

Petition denied.

CRUISE *versus* ALLEN.

No. 19. Submitted July 12, 1906.—Decided August 16, 1906.

REAL PROPERTY. TITLE TO.
Cannot be transferred except by a duly registered deed.

SAME. TITLE BY ADVERSE POSSESSION.
Cannot be acquired as long as tenants or agents of the original owner are in possession of the property.

Appeal by defendant from the Circuit Court of the Second Judicial Circuit; Hon. H. A. Gudger, Judge.

THE facts appear in the opinion.

W. H. Carrington, for appellant. *T. C. Hinckley*, for respondent.

LORIN C. COLLINS, J. This is an appeal from the decision of the Circuit Court of the Second Judicial Circuit. It appears from the evidence that one Thomas Cruise, being the owner of one house and shop at Las Cascadas, left the same in charge of one John Brown on his departure to Jamaica in 1889, in which place he remained until 1905. On his return, he found one Louisa Allen in possession of said property and demanded possession, which was refused, and hence this action. The Court below awarded the possession of this property to the plaintiff.

William Lewis testified that Cruise left John Brown in the possession of said houses. When John Brown left, he gave them in charge of one Robert Green. When Robert Green left he gave them in charge of one Sarah Cushing. Witness Markland testified to the possession of Brown and Green

and that Green was in possession until 1904, at which time Louisa Allen took possession. Also that Mrs. Allen was not in the house at the same time as Robert Green. Witness Davidson testified that he was a tenant at the time that Cruise went to Jamaica and that Brown was in charge of the property, and that he never paid any rent to a Chinaman, or recognized him as landlord. Witness Cushing testified that when she took possession of the houses, Robert Green was in charge; that he left her in possession and that when she left, she left the houses in charge of John Level; that she knew nothing of Mrs. Allen taking possession of the houses. Green told her that he was going to Port Limon and would leave the houses in her charge and John Level's and that if Thomas Cruise ever returned, the houses were his. Mrs. Cushing testified that she never saw Mrs. Allen in possession of the houses.

The defense called John Level who testified that when Cruise left he delivered the possession to a Chinaman named Alfonso, for a debt. He left John Brown in charge of the dwelling house. John Brown lived in the house as a servant to Alfonso after he took the shop. He did not know what time the Chinaman took over the house. Mrs. Allen was in possession in 1901; Robert Green and Mrs. Cushing had it for a Chinaman; after they left he (Level) was the master; Mrs. Allen took charge about four years ago, getting possession from Alfonso; Robert Green was living there. He believed that Alfonso was in possession. Robert Green was in the small house, the large one being let. Brown was there five years as the Chinaman's butler. Sarah Cushing was the last one living there and gave Level possession. Joseph Wright testified that Mrs. Allen took the house over last year. The defendant testified in her own behalf that she has had the houses since 1902. She never asked for any money for their rent and knew that Sarah Cushing was there. The Chinaman told her that he left Green in charge; that Mrs. Cushing lived there before she took charge; that she went to Robert Green and said she had a claim on the houses and wanted them and he moved out and left them for her. She further testified that she saw Level and that she asked him for the houses which Alfonso owned and he

said he was there to give them over; that she had paid taxes every year and presented receipts for a period from January 1 to December 31, 1905.

It appears from a consideration of this evidence that while Mrs. Allen may have had an understanding with Alfonso to the effect that she was the owner of the houses, she never had any open, adverse or notorious possession of the same until the departure of Sarah Cushing, and the evidence, uncontradicted, of witnesses Lewis, Markland and Sarah Cushing, and the defendant herself, shows that Sarah Cushing was left in possession for Cruise and that Mrs. Allen never took possession of the property in any physical sense, or through tenants, until the departure of the witness Cushing in September, 1904. Hence, there have been no rights acquired by Mrs. Allen by prescription.

Nor did Mrs. Allen show any contract or title in settlement of a debt and by which the houses were given her by a proper conveyance. Houses, according to Art. 656 of the Civil Code, are buildings, and buildings are real estate, according to the same article. The ownership of real estate is not transferred except by a public deed duly registered in accordance with Arts. 1857 and 756 of the same code. The defendant and appellant not having shown any title of that kind failed to prove that she was the legal owner of the houses and that she had the legal possession. The judgment of the court below is affirmed.

The CHIEF JUSTICE concurred.

Affirmed.

CANAL ZONE *versus* WRIGHT *et al.*

No. 17. Argued July 9, 1906.—Decided August 31, 1906.

JUDGMENT. TIME OF RENDERING.

When judgment was rendered immediately after verdict, instead of waiting two days, it was held that defendant should have objected at the time, since Section 224 of Act No. 15 is not mandatory unless invoked by the defendant.

LARCENY. INTENT.

Defendants took a hand-car without permission and rode on it until arrested. HELD, that this constituted larceny as a larcenous intent was to be presumed. The appropriation completed the crime regardless of their intent as to the ultimate disposition of the car.

Appeal by defendants from judgment of the Circuit Court of the First Judicial Circuit; Hon. F. Mutis Durán, Judge.

THE facts appear in the opinion.

T. C. Hinckley, for appellant. *G. M. Shontz*, for the Canal Zone.

LORIN C. COLLINS, J. This cause came into this Court by appeal from the First Circuit on an information charging the defendants with the larceny of one pump hand-car of the value of two hundred dollars United States currency. On the trial of said cause the following evidence was heard:

"Agreed statement of facts, between Mr. G. M. Shontz, Assistant Prosecuting Attorney for the Canal Zone, and Mr. T. C. Hinckley, representing the defendants in the case of the Canal Zone *v.* Fred Wright *et al.*

"The Government of the Canal Zone through its Assistant Prosecuting Attorney, G. M. Shontz, filed an information against Fred Wright and Joseph Sergent, on the 9th day of June, 1906, charging these defendants with the crime of larceny. To be more specific the information reads as follows, to-wit: 'That Fred Wright and Joseph Sergent on or about the first day of June, 1906, at or near Corozal, and within the jurisdiction of this Court, did then and there one pump hand-car of the value of two hundred dollars, United States currency, of the goods and chattels of the

Panamá Railroad Company, then and there being found, feloniously take, steal and run away, contrary to the law in such cases made and provided, and against the peace, government and dignity of the Canal Zone.'

"The defendants being arraigned entered a plea of not guilty and not being able to retain counsel, the Court appointed Mr. T. C. Hinckley to defend them. The Government introduced six witnesses at the trial, while the defendants introduced none nor did they take the stand in their own behalf.

"The witnesses for the Government testified as follows: That the hand-car in question was originally at Corozal, having been left there by them, the witnesses, a short time prior to the time hereinafter mentioned; that it belonged there and that it was the property of the Panamá Railroad Company; that it was removed or taken away from Corozal by some one on the first day of June, 1906, in the evening; that it was seen and recognized by four of the Government's witnesses on the same evening, in charge of the two defendants, about three-quarters to seven-eighths of a mile from Corozal, at bridge 62, and was being run and propelled by defendants in the direction of Miraflores; that when the witnesses asked the defendants where they had gotten the hand-car, the defendants replied that it had been loaned to them by the subforeman at Pedro Miguel; that the defendants were at this time attempting to remove the hand-car from the tracks, and had actually succeeded in taking two wheels of the same off the track. (There is no evidence as to whether the hand-car was on the main track of the Panamá Railroad Company or not.) The defendants asked the four witnesses then to give them a 'lift' meaning thereby to let them, the defendants, ride with witnesses.

"The evidence does not show that the car was actually removed from the tracks, further than the two wheels above mentioned. After leaving the hand-car, the defendants and four witnesses for the Government all rode in the direction of Miraflores on the hand-car upon which the said Government's witnesses had been riding when they first saw the defendants, as above set forth. They soon met one Jas. K. Brown, another witness for the Government, who is the foreman in charge of the double track for the Panamá Railroad Company, and who had the defendants arrested."

On this evidence, the defendants were found guilty and judgment rendered against them whereby they were sentenced to hard labor in the penitentiary of the Canal Zone for the period of one year each.

The first point raised by the bill of exceptions is that the

verdict of the court was contrary to the law and the evidence. On examination of the agreed statement of facts, the Court finds that the verdict was supported by the evidence.

The second point raised is "that the Court did not wait the usual two days between the rendering of the verdict and the passing of judgment upon the defendants." The record shows that they were found guilty and sentenced upon the same day. Section 224 of Act No. 15, provides that after verdict of guilty, if the judgment be not arrested or a new trial granted, the Court must appoint a time for pronouncing judgment, which, in cases of felony, must be at least two days after the verdict, if the Court intend to remain in session so long; but if not, then at as remote a time as can reasonably be allowed. This objection cannot be considered by the Court, as no exception was taken to the action of the Court at the time judgment was rendered, which should have been done if the defendants desired to avail themselves, for any cause, of the provisions of the statute. We do not regard the statute as mandatory upon the trial judge unless the same is invoked by the defendants.

Had the laws of the Canal Zone permitted the information to be filed in this cause for malicious mischief, making the offense proven a misdemeanor, the punishment might have been made lighter, but as the information was drawn as it is and the law is as it is, if the defendants were found guilty, the smallest sentence they could receive would be one year each in the penitentiary. Intent is an ingredient in every crime, but intent may be presumed from the acts of the accused. Had a man taken a horse of another and driven it three or four miles, without his knowledge or consent, and been apprehended with the horse in his possession, it would hardly be contended that he had not a larcenous intent. Whatever the intent of the defendants might be as to ultimate disposition of the car, their appropriation and deportation of the same was an act so reprehensible and dangerous as to merit the punishment imposed when all the possibilities of their act were considered. The Court takes judicial cognizance of the construction and curvature of the tracks of the Panamá Railroad Company. Trains run

almost constantly over said line, some on regular time schedule and others under the control of the train dispatcher. It is quite possible that a train might be wrecked and many persons injured or killed by such an act as the defendants committed. Society must be safeguarded and if in so doing the punishment that falls upon those who imperil others is heavy, they should not, on the other hand, be allowed to go free, and encourage others in the commission of the same offense. Therefore, as the lightest sentence that could be under the evidence, has been imposed upon the defendants, the Court will not disturb the verdict or judgment in the case. Judgment affirmed.

JUSTICE GUDGER concurred.

Affirmed.

BOSQUEZ *versus* SOLÍS *et al.*

No. 21. Submitted January 21, 1907.—Decided February 25, 1907.

EJECTMENT. PAYMENT FOR IMPROVEMENTS.

When the defendant constructs and occupies a house in good faith with the consent of the owner of the land, he cannot be dispossessed by such owner unless he is reimbursed for the improvements made by him.

Appeal by plaintiffs and by one of the defendants from judgment of the Circuit Court of the Second Judicial Circuit; Hon. H. A. Gudger, Judge.

THE facts appear in the opinion.

N. Barsallo, for plaintiff. *H. Patiño*, for defendant.

F. MUTIS DURÁN, C. J. In this case from the Second Judicial Circuit, it appears that Narciso Barsallo, as attorney for María Jaramillo de Bosquez, Carmen Bosquez de Paredes, and Manuela de J. Bosquez, prayed for the ejectment of José Dolores Solís and Vicenta Fernandez de Calandre from certain lands in the village of Matachin, where the defendants had a house and enclosure. Plaintiff also asked judgment for $1,852.20, silver, as rent for the land on which

the house was situated. The defendants in their answer denied the right of the plaintiff for the reason that the case had already been decided by the courts of Panamá, in the case of the Bosquez family against Solís, in favor of Solís, and contended that, as Solís had sold the house and enclosure to Fernandez by a public deed duly registered, the case was *res adjudicata* as to both defendants. However, the defendants agreed to pay rent for the land in case the plaintiff should prove ownership to the land. The lower court decided that the case was *res adjudicata* so far as Solís was concerned, and ordered the defendant Fernandez to pay the sum of $358.05, silver, as rent for the land. Both parties appealed from this sentence; the defendant Fernandez, for the reason that, as she derived her title through Solís, the case should be declared *res adjudicata* as to her in the same manner as to Solís; the plaintiff appealed because the final judgment of the court below did not decree the ejectment, as prayed for in the original petition.

From the documentary evidence introduced in the lower court it appears (1) that Félix José de Icaza, with the knowledge and consent of Buenaventura Correoso, constructed a house in the village of Matachin; (2) that after the death of Félix José de Icaza, his heirs remained in the peaceful possession of the said house, and that afterwards José Dolores Solís occupied it without any title in the land and was maintained in his possession by the courts of Panamá, as is shown in the judgment of May 4, 1905; (3) that the lands in Matachin were sold at public auction to Buenaventura Correoso in 1883, and that he in turn conveyed the same to the legitimate children of María Jaramillo de Bosquez and of Carmen Bosquez de Paredes, as is shown by public deeds Nos. 10 and 128; with the exception of a certain part of the said land which had been sold by Correoso to the old French Canal Company by public deed of May 23, 1883, (as indicated on the map signed by the Director-General of the Canal Company, by Correoso and by the Bosquez family); (4) that according to this map and the ocular inspection made by order of the court of Panamá, the house and enclosure were not within the land sold to the Canal Company, but were within the adjoining lands belonging to Correoso or to the

Bosquez family, bounded as follows, according to the deeds and the map: Starting from the west bank of the Chagres River and extending along the stream known as the "Cuarto Calles" to the bridge called "Puente Ciego" or "Puente de Algandona" of the same railroad. The line extends in a straight direction from that point up to the old Panamá road or highway, thence continuing towards the ravine known as "Maria Rosa," and from said ravine on an imaginary line in a southerly direction to the "Mandinguita" ravine, thence towards the river "Obispo" at a point where the bridge called "San Pablito" crosses, and from said point following the river Obispo to where it flows into the river Cruces or Chagres, and returning thence to the starting point known as "Cuatro Calles;" (5) that by public deed No. 165 of October 10, 1904, José Dolores Solís sold the house to Vicenta Fernandez.

From the above facts it appears that Félix José de Icaza and his successors constructed and possessed the house in good faith, with the knowledge and consent of the owner, in accordance with the doctrine of the second part of Art. 739 of the Civil Code. But as the defendant Vicenta Fernandez admitted in her answer that she would pay the rent if the plaintiff could prove ownership to the land, and as it appears that the plaintiff has proved such ownership, the Court confirms the judgment of the lower court.

Regarding the matter of the disoccupation of the land, on which point the plaintiff appealed, the Court is of the opinion that the defendant cannot be dispossessed until the plaintiff has paid for the improvements, as provided for in the above mentioned article.

JUSTICE COLLINS concurred.

Affirmed.

CANAL ZONE *versus* CLARK.

No. 23. Submitted January 21, 1907.—Decided April 2, 1907.

VARIANCE. INFORMATION AND VERDICT.

Defendant was tried on an information charging larceny only and was found guilty of receiving stolen property. HELD to be error as the two offenses are separate and distinct, though sufficently similar to justify two counts in the same information.

LARCENY. RECEIVING STOLEN PROPERTY.

Charge of larceny does not include that of receiving unless there is a count to that effect. That the greater crime includes the lesser is true only when the higher involves the commission of the lower, which is not true in the cases of larceny and receiving.

Appeal by plaintiff from the Circuit Court of the Third Judicial Circuit; Hon. Lorin C. Collins, Judge.

THE facts appear in the opinion.

W. H. Carrington, for appellant. *G. M. Shontz*, for the Canal Zone.

H. A. GUDGER, J. The prisoner was tried in the Third Judicial Circuit on an information charging that he did "twenty-eight hundred dollars, lawful money of the United States of America, of the goods and chattels of one Luca Analitz, then and there being found, feloniously steal, take and carry away, etc." There was no count in the bill for "receiving." The court rendered the following verdict: "The Court finds the said defendant guilty of the crime of receiving and having stolen property in his possession, knowing the same to have been stolen." Motion for a new trial on the ground of variance between the charge in the bill of information and verdict was made and refused, to which the defendants excepted and appealed to this Court.

By statute and common law, larceny is a felony. "Receiving" at common law was a misdemeanor; but by statute, in most States, is made a felony. In the laws of the Canal Zone, "receiving" is a felony but not a larceny. The two

offenses are separate and distinct, yet sufficiently similar to justify a count in the same information, the one for larceny or "taking" and the other for "receiving," knowing at the time the property to have been stolen. The charge of the commission of larceny does not embrace that of "receiving" unless there is a count in the bill of indictment to that effect. This is common law doctrine, and has the sanction of several States of the Union. In Desty's Criminal Law, under the head of "receiving stolen property," there appears the following:

"147—a. Receiving stolen property, knowing it to have been stolen, is an offense at common law. A party who was not present at the theft but subsequently, with guilty knowledge, received and aided in the disposal of the goods is not an accessory to the theft but is liable as receiver, it being a substantive crime, and he may be prosecuted as principal; and he is punishable at common law by fine and imprisonment unless likewise the thief was received and harbored. If he received the goods simply to aid the thief in carrying them off he is guilty as receiver. Persons receiving stolen goods do not thereby become guilty of larceny; but the common law offense is enlarged by making the receiver guilty as the thief."

In the American and English Encyclopedia of Law, Vol. 24, p. 44, under the head of "receiving stolen goods," and likewise under statute in most jurisdictions of the United States, the offense is a distinct and substantive crime in itself and is not merely accessorial to the principal offense of larceny.

In Bishop's Criminal Law, Vol. 2, sec. 1140, under the head of "Principal of Second Degree" is the following: "An aider at the fact of the original larceny—in other words, a principal of the second degree, cannot be holden as receiver. More broadly, one cannot receive goods which he has himself stolen, or commit larceny by receiving those already stolen by another." On p. 424, sec. 699, Vol. 1 of the same Criminal Law, after discussing "Receiving stolen goods," this section closes with the following: "The modern English legislation permits the receiver of stolen goods to be proceeded against for felony, as a substantive offense, without any reference to the principal offender;" and a foot-note at the bottom, referring to this clause, states: "The crime

of the receiver, however, is not, like that of the principal, larceny."

In Texas, it has been expressly held that a conviction for receiving stolen goods cannot be had in an indictment for theft;

Choneller v. State, 15 Texas App., 587;
Brown v. State, 15 Texas App., 581;
Goether v. State, 21 Texas App., 527;
Gray v. State, 24 Texas App., 611.

It has also been held that larceny or receiving cannot be charged in the same count, though there may be in the same bill of indictment a count for larceny and a separate count for receiving;

State v. Moultree, 33 Am. Rep., 1146 (La.);
Trivdale v. State, 18 Texas App., 632.

In North Carolina, the court has decided that the crime of larceny and of receiving are separate and distinct, and that one cannot be convicted of receiving on an indictment charging the stealing, taking and carrying away of the goods of another, though in this State it is also decided that the two crimes may be charged in the same bill of indictment under separate counts;

State v. Speight, 59 N. C., 72;
State v. Adams, 133 N. C., 667.

In Lousiana and in Texas it has been held that larceny and receiving cannot be charged in the same count. In some of the States of the Union, among which may be named Virginia and Ohio, receiving has been made larceny by statute, and it has been held that in such cases it is necessary only to charge that which would constitute the crime of larceny.

By reference to the U. S. Revised Code it will be noted that the distinction between larceny and receiving is kept in view, both being substantive offenses with different punishments.

Reference has been made to Sec. 207, p. 190 of the Code of Criminal Procedure of the Canal Zone, which indicates that a defendant may be convicted of the commission of an offense "which is necessarily included in that with which

he is charged." This raises the question of the higher offense embracing the lower, and what crimes come under the rules as laid down for their government. We find in the Encyclopedia of Pleading and Practice, vol. 10, p. 542, the following: "The charge of an offense of a lower grade may be embraced in the charge of a higher offense when the higher involves the commission of the lower and when the indictment contains all the substantial allegations necessary to let in the evidence of the lower grade, but in order to include in the charge of the crime an offense of a lower grade between that charged, the greater must include all the ingredients of the lesser."

To illustrate the doctrine above, reference can be had to the crime of murder. A party charged might be convicted either in the first degree, or the second degree, or for manslaughter, the greater in this case including the less and all dependent on the one substantive fact, the slaying. The same may be said of other offenses of a similar character, but it will be observed that the doctrine of the higher including the lesser can only be embraced in those cases where each relate to the salient fact, as, in the instance of murder, to the slaying. In other words, in the language of the Code, the one must necessarily include the other. In the case before us, this is not true. The charge of larceny or "taking" does not necessarily include the "receiving" for the reason that the two may occur and, indeed, must occur at different periods of time. A charge may be made against A of theft committed one year ago, and B may be charged with receiving the property stolen by A the week, the month, six months, or a year after the alleged theft. So that the conclusion seems inevitable that "larceny" and "receiving" are each a crime within themselves; and a party may be tried for the one or the other, or on a bill of information which contains a count for the one and a separate count for the other, in which case the prisoner might be convicted on either count as the evidence might justify.

It may not be amiss to refer to the rules and regulations laid down in the Code of Criminal Procedure of the Canal Zone regarding informations to be filed against persons charged with crime. It will be seen that the information is

required to contain the names of the parties, the jurisdiction, and such other information as is necessary to place the party on notice of the exact crime with which he is charged. Among other things, the second rule contains the following: "A statement of the acts constituting the offense in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended." Take the case before us, and it is very easily understood that the information intends to charge the prisoner with being present at and engaging in the commission of the crime of larceny; and, on the other hand, it would be very difficult to understand from this information that it was intended to assert, or to put him on notice, that he was charged with having received these stolen goods after they had been stolen. It seems therefore, clear that the rules laid down simply and only mean to assert that the information shall contain a sufficient statement of the crime alleged, with dates, names, etc., as to indicate clearly to the defendant the charge made against him so that he may properly answer the same. Should an information contain this, under the rules it would seem sufficient. Should it fail to do this, it seems that it would be defective. The crime of larceny and that of receiving being each substantive offenses, no conviction can be had for the one on a charge of the other; yet, as before stated, it is perfectly admissible in the information to have a count for larceny and a separate one for receiving stolen goods. The contention of the parties that there was a variance between the charge and the verdict of the court is, in our opinion, well taken.

It is therefore ordered by the Court that the judgment rendered in the Third Judicial Circuit in the above entitled cause be reversed and a new trial granted, and this opinion will be certified to the court below in order that proceedings may be had in accordance therewith.

The CHIEF JUSTICE concurred.

Reversed and remanded.

CANAL ZONE *versus* COULSON.

No. 28. Argued April 9, 1907.—Decided May 6, 1907.

CANAL ZONE. STATUS OF.

The United States is not owner in fee of the Canal Zone; it has only the use and occupation as long as it complies with the terms of the treaty. Hence, the Constitution of the United States does not apply to the Canal Zone of its own force.

DUE PROCESS OF LAW.

It is the general law of the land which renders judgment only after trial.

JURY. TRIAL BY.

Is not guaranteed to the Canal Zone by the Constitution of the United States.

Appeal by defendant from the Circuit Court of the Second Judicial Circuit; Hon. H. A. Gudger, Judge.

THE facts appear in the opinion.

P. P. Hillerman and *W. H. Carrington*, for appellant.
G. M. Shontz, for the Canal Zone.

LORIN C. COLLINS, J. On the 29th day of January, 1907, the information upon which the defendant was tried in the court below, was filed in the Circuit Court of the Second Judicial Circuit. Said defendant was duly arraigned thereon and pleaded not guilty. A demurrer was filed to the information; the demurrer was overruled, to which exception was duly taken by the defendant. The case came duly on for trial on the 1st day of March, 1907. On the trial there were associated with the Circuit Judge, H. L. Ross, Municipal Judge of Gorgona, and R. B. Myers, Municipal Judge of Empire, who both participated in the trial of said cause pursuant to statute and were duly sworn and qualified as such associate judges.

The evidence shows that the defendant came to the Isthmus about twenty-one months prior to the date of the alleged offense and lived at Gorgona; that some five or six

months prior to the death of his wife he lived with one Louise Mendez, and they cohabited together for some little time before the said Louise Mendez ascertained the fact that the defendant was a married man and that his wife was not then upon the Isthmus. She, however, after having acquired this information continued her relations with him as before. On the 5th day of December, 1906, Coulson's wife unexpectedly appeared in Gorgona, and it was shown by the evidence that the defendant and Louise Mendez were greatly surprised when she appeared at Gorgona. Coulson obtained a room for himself and wife and ostensibly lived with his wife up to the time of her death, but frequently and continually made visits to, and spent much of his time with, Louise Mendez. The deceased, Marian Coulson, from the time of her arrival at Gorgona, up to the time of her death, repeatedly upbraided the defendant for continuing to live with Louise Mendez, or with having anything to do with her. Angry words passed between husband and wife; nevertheless, the defendant continued to ignore the wishes of his wife and frequently visited Louise Mendez. Just after the arrival of Mrs. Coulson at Gorgona, she procured the aid and assistance of a policeman to get her husband to leave the company and presence of Louise Mendez. This state of affairs continued until January 10, 1907, when Marian Coulson died, under circumstances which convinced the attending physician that her death was caused by poison. The physician refused to grant a death certificate, or to allow the body to be buried or to be removed from the place, at which it was at the time of the death, to the morgue at the hospital at Gorgona, until a post mortem examination was held. The evidence further shows that on the 9th and 10th of January and up to the time that the death occurred, the wife was in great agony and suffered excruciating pains. Her neighbors called upon her on the 9th of January and early in the morning of the 10th, and to many she stated, in the presence of the defendant, that her condition was caused by two powders given to her by the said defendant, one on the 8th of January and one early in the morning of the 9th of January. She told these neighbors and the attending physician, in the presence of the defendant, that she was

dying, and described to them her condition and her feeling. It became apparent to the physician that she was suffering from poison administered into her stomach. When the doctor gave the deceased a powder for the purpose of alleviating her pains and to check vomiting, the deceased stated that the powder administered by the doctor was bitter, while the two powders administered by her husband were tasteless. From these statements and from the symptoms manifested by the deceased during the day of the 9th and the morning of the 10th of January, the physician refused to grant the defendant a death certificate after the death of the said Mrs. Coulson and refused to allow the body to be buried.

The evidence further shows that at the post mortem examination there was a careful examination which showed all the indications of an irritant poison. The stomach of the deceased, a portion of the liquid contents of the stomach, and portions of the liver, kidney, spleen and part of the pancreas were carefully removed. These were sealed in a glass jar and carefully kept in the possession of Dr. Smith who took them personally to the laboratory at Ancon, where a complete chemical analysis was made of the contents of the organs above mentioned. As a result of this chemical analysis of the contents of the stomach, there were found twelve and one-half grains of arsenic. The doctors who were called to testify were thoroughly agreed that the indications and symptoms manifested by the deceased during her last sickness, coupled with the fact that twelve and one-half grains of arsenic were found in her stomach after her death, showed that she came to her death by reason of arsenical poisoning. The evidence further showed that three grains of arsenic is sufficient, absorbed in the human body, to produce death; that after death, there was enough arsenic found in the stomach of the said Marian Coulson unabsorbed to have killed four people, and the evidence further showed that there was no way of telling the number of grains which had been absorbed before her death. Sergeant Dooley testified that the defendant voluntarily confessed to him that he had, at various times between January 8th and 9th, endeavored to administer poison to his wife for the purpose of producing death; that on January 8th and 9th he, the defendant,

administered the poison as has been above stated; and that he, the defendant, did not know the name of the particular poison he was administering.

The defendant offered no evidence on his own behalf and the court and associate judges returned the following verdict: "We, the undersigned Circuit Judge and Associate Judges in the above entitled case, after carefully considering all the evidence in the case, for a verdict find that the defendant, the said Adolphus Coulson, is guilty of murder in the first degree, as charged in the information." A motion for a new trial was made and overruled, and the 12th day of March, 1907, set for the day of pronouncing judgment. On said day the defendant was sentenced by the court to be confined in the penitentiary in safe and secure custody until Friday the 13th of September, 1907, and upon said day, between the hours of twelve noon and two in the afternoon, within the walls of the said penitentiary, in the presence of the witnesses required by law and in the manner and form prescribed by law, to be hanged by the neck until he, the said Adolphus Coulson, be dead. From this judgment order, the case comes to this court upon appeal.

There seems to be no question raised in this Court as to the findings of fact. Therefore we have only to consider the questions of law raised.

The defendant's counsel, in the brief filed in this court, waived all of the exceptions taken at the trial except the second exception which was: "That the court erred in overruling the application of the defendant for a trial by jury." This ground of error is the sole ground necessary for consideration on this appeal.

The treaty between the United States of America and the Republic of Panamá provides in Article II: "The Republic of Panamá grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the canal to be constructed." Article III of said treaty "grants to the United States all the rights, power and authority within the zone mentioned and

described in Article II * * * which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panamá of any such sovereign rights, power or authority." In Article V of said treaty. "The Republic of Panamá grants to the United States in perpetuity a monopoly for the construction, maintenance and operation of any system of communication by means of canal or railroad across its territory between the Caribbean Sea and the Pacific Ocean." Article XIV provides that as the compensation for the rights, power and privileges granted by the Republic of Panamá to the United States, the United States should pay to the Republic of Panamá the sum of ten million dollars in gold coin of the United States on the ratification of this treaty, and make an annual payment during the life of the treaty of $250,000 in gold coin of the United States beginning nine years after the date of the treaty.

This treaty was duly ratified by the Republic of Panamá on December 2, 1903, and by the United States on the 23rd of February, 1904.

The President of the United States, on May 9, 1904, issued an Executive Order to the Secretary of War authorizing the establishment of a government in the Canal Zone, creating a Commission to whom were delegated legislative powers and defining the nature of the powers and rights of the inhabitants of the said Zone. This Executive Order is the organic law of the Canal Zone and the provisions therein which have a bearing upon the error assigned are: "That no person shall be deprived of life, liberty or property without due process of law; * * * that in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The fifth amendment to the Constitution provides that "no person shall be compelled in a criminal case to be a witness against himself, nor to be deprived of life, liberty or property without due process of law." The sixth amend-

ment to the Constitution provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The contention is made that "the Canal Zone belongs to the United States of America; (Wilson *v.* Shaw, 204 U. S.) and as the territory is part of the United States, the Government and the citizens both enter under the authority of the Constitution with their respective rights defined and marked out, and the Federal Government can exercise no power over the personal liberty or property of an individual beyond what the Constitution confers, nor cannot deny any rights which the Constitution has reserved." We have not the decision of the Supreme Court of the United States before us, in the case of Wilson *v.* Shaw, but are of the opinion that the Supreme Court did not hold more in that case than that the United States had the use, occupation and control in perpetuity of the Canal Zone.

It is apparent from an examination of the treaty, that the United States is not the owner in fee of the Canal Zone, but has the use, occupation and control of the same in perpetuity so long as they comply with the terms of the treaty and pay $250,000 in gold coin of the United States of America, per annum, to the Republic of Panamá. There is nothing in the treaty aforesaid that should bring this case within the decision made in the case of the treaty with Russia in Rassmussen *v.* United States, 197 U. S., 516. Rather does it come within the reasoning of Dorr *v.* the United States, 195 U. S., 138, and Downes *v.* Bidwell, 182 U. S., 244.

We are therefore of the opinion that the Canal Zone is territory in the use and occupation of the United States of America, under its control, but is not such territory that the Constitution would be legislative, and of its own force carry its rights, privileges and limitation into it.

It appears from the Executive Order that the only pro-

vision of the Constitution of the United States that would be applicable to the case at bar and that would be binding upon this court, is contained in the phrase "nor to be deprived of life, liberty or property without due process of law." The words "due process of law," said Judge Bronson, "cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title of property." Potter's Dwarris on Statutes. The definition most generally adopted is that given by Mr. Webster who said "by the law of the land, is most clearly intended the general law, which hears before it condemns, and proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society. Everything which may pass under the form of legislative enactment, is not therefore the law of the land."

The Supreme Court of the United States, 110 U. S., 156, say: "Any legal proceeding enforced by public authority whether sanctioned by age or custom or newly devised in the discretion of the legislative power in furtherance to the general public good which regards and preserves these principles of liberty and justice," is due process of law.

The defendant, therefore, as he has been tried with the due course of legal proceedings according to these rules and forms, which have been established in the Canal Zone for the protection of private rights, has been tried in manner to meet the constitutional requirements of not being deprived of life without due process of law.

The seventh amendment to the Constitution, which gives every party the right to trial by jury whether the amount in controversy exceeds $20.00, does not apply to trials in state courts:

Edwards *v.* Elliott, 88 U. S., 532;
Pearson *v.* Yewdall, 95 U. S., 294.

The sixth amendment, providing that the accused shall enjoy the right of a jury trial, applies to Federal and not to State courts:

Williams *v.* Hert, 110 Federal Reporter, 166.

It is said (Downes v. Bidwell, 182 U. S., 246) that the civil government of the United States cannot extend immediately and of its own force, over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the President as commander-in-chief. * * * Indeed the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct. * * * We are also of the opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in, what Chief Justice Marshall termed in the words, "American Empire."

The question before us for consideration has been so fully disposed of by the Supreme Court of the United States in the many decisions rendered as to the effect of the fifth, sixth and seventh amendments to the Constitution of the United States, that it is unnecessary to enlarge further.

There being no reversible error in the records presented in this case, the decision of the Circuit Court of the Second Judicial Circuit is affirmed.

The CHIEF JUSTICE concurred.

Affirmed.

CANAL ZONE *versus* COLINAS.

No. 26. Argued April 8, 1907.—Decided May 6, 1907.

FORGERY.

A pay certificate calling for $38 60 in writing and in figures in the body of the instrument and for $18.60 in figures in the margin, had these latter figures changed to $78.60 No proof was offered as to the meaning of the marginal figures. HELD that a change in the margin of an instrument, when the body of the instrument is unchanged, is not a forgery. The marginal figures formed part of an independent transaction as to which no proof was offered.

EVIDENCE. VARIANCE.

There is a variance when the information alleges that the United States was defrauded and the proof shows that it was the Isthmian Canal Commission that was defrauded.

Appeal by defendant from the Circuit Court of the Second Judicial Circuit of the Canal Zone; Hon. H. A. Gudger, Judge.

THE facts appear in the opinion of Justice Collins.

Sam B. Dannis, for appellant. *G. M. Shontz*, for the Canal Zone.

LORIN C. COLLINS, J. An information was filed against the defendant before the Circuit Court of the Second Judicial Circuit on February 12, 1907, said information containing three counts, one charging the defendant with forging a due bill, order or request for payment of money by the United States of America; second, with uttering and forging a due bill, order or request for payment of money by the United States of America; and third, with passing as true and genuine a due bill, order or request for payment of money by the United States of America. And the said defendant was arraigned upon said information and pleaded not guilty, and a trial was duly had.

A timekeeper of the Isthmian Canal Commission, being called as a witness, testified that he gave the defendant the check; that it was not now the same as it was when he first gave it to him. He gave him the check at Empire, and when

he gave it to him it was for $18.60. The next witness called was from the paymaster's office and he testified that he paid the check on the pay car; that on that day he paid from Empire to Corozal, including Corozal; that he does not remember at what place it was that he paid the defendant whether it was at Empire or at the other end of the line; "all I remember is paying the man, but I cannot remember whereabout we were at the time I paid him." Whereupon the Government rested its case.

The attorney for the defendant moved the court to discharge the defendant on the ground that the Government failed to prove where the crime was committed, which motion the court overruled and the defendant duly noted his exception, and the court found the defendant guilty under the first count and sentenced him to one year in the penitentiary. A motion for a new trial was filed on the ground that the verdict was contrary to the law and the evidence, which motion for a new trial was duly overruled.

The court certified to the Supreme Court that the defendant was charged with altering a pay certificate issued by the agents of the Isthmian Canal Commission; that the alteration consisted in the change in the upper right hand corner of the certificate from $18.60 to $78.60; that the pay check was issued and delivered to the defendant in the District of Empire and the work for which the same was issued was done in the said district and that the defendant lived there; that the pay car stopped at Empire, Culebra and various other points in the District of Empire, and at two points, Pedro Miguel and Corozal, outside of said District; that the check was paid by the agents of the Isthmian Canal Commission to the defendant, in the sum to which it had been raised. The defendant was found guilty and sentenced on the first count of the information, which charged that the defendant did, unlawfully and knowingly, falsely make and forge a due bill, order or request for the payment of money by the United States of America, with the intent then and there the Government of the United States to injure and defraud, contrary to the law in such cases made and provided, and against the peace, government and dignity of the said Canal Zone.

Forgery is defined by Bouvier to consist of the false making and materially altering with intent to defraud any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. An examination of the pay certificate offered in this case reveals no change or alteration in the body of the certificate. In the margin, entirely outside of the shaded lines which surround the pay certificate, are found the numerals $78.60. So far as appears from an examination of the pay certificate, they bear no relation whatsoever to the certificate itself, and there is not a scintilla of evidence in the record that said figures are of any importance whatsoever. Below the figures $78.60, within one inch thereof, appear the numerals $38.60 which correspond to the receipt upon the face of the certificate where the figures are written out. Any person reading said certificate must be advised that $38.60 is the most that can be paid thereon.

It has been held in all jurisdictions that the alteration made upon a writing must be material. There is nothing in the record in this case to show that any materiality whatsoever could be attached to the figures outside of the margin of said pay certificate in the upper right hand corner. It also appears from an inspection of the said pay certificate, that it is issued by the Isthmian Canal Commission and directs their disbursing officer to pay the amount therein stated. The court is of the opinion that there is a variance between the pay certificate offered in evidence and the first count in the declaration, in that the said pay certificate is not a due bill, order or request for payment of money by the United States of America.

It would appear that the act, if any, committed by the defendant, if proved against him, was a crime under Section 382 of the Penal Code of the Canal Zone, which reads as follows: "Every person who knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property * * * is punishable in the same manner and to the same extent as for larceny of the money or property so obtained." Or under Section 81 of the said Code, which reads as follows: "Every person who, with intent to defraud, presents for allowance or for

payment to any disbursing officer, or other officer, or to any person or officer authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is guilty of felony." Were there a count in this information charging the defendant with the crime defined in either of said sections, there is no proof in the case on which a conviction could be based.

For the reasons assigned, this case is reversed and remanded for further proceedings in conformity herewith.

F. MUTIS DURÁN, C. J. I concur in the foregoing opinion for the reason furthermore, that it does not appear from the wording of the document said to have been altered, neither from the evidence submitted in the trial, that the amount expressed in ciphers in the margin of the document, which amount was different from that which appeared in writing and in ciphers in the body of the document, was intended to represent the actual value of such document, after there having been deducted from it the amount previously received on account by the holder. Neither did there appear any agreement or understanding between the parties that such amount placed in the margin should represent the legal value of the document. The marginal ciphers outside the border line of the instrument appear to be isolated, and from the evidence submitted do not appear to bear any relation to the body of the document. Therefore, it cannot be said that an alteration of the marginal ciphers in this particular case is an alteration of the legal value of the document, nor that there has been committed the crime of forgery.

The marginal ciphers or numbers form part of a transaction between the parties independent of the one expressed in the body of the document, which transaction does not figure in the body of the document, neither in the proof submitted at the trial. There is nothing to show what this transaction might have been, consequently there is no explanation of the meaning of the ciphers placed in the margin. The personal knowledge that the judge may have of such transactions is not available as evidence. Cyclopedia of Law and Procedure, Vol. 19, p. 1375, under heading "Immaterial

alterations" reads as follows: "In order that an alteration constitute forgery, it is essential that it be material * * * the addition of a figure in the margin, the body remaining unchanged, * * * the legal effect of the instrument not being varied, is immaterial." Under Note 45 of the same page there appears a case in which the alteration of a cipher in the margin of a check was considered as a case of forgery, the cipher altered expressing in numbers the same amount as that written in the body of the check. But the foregoing case is different from the one under consideration, because the cipher changed corresponded to the amount written in the body of the check, and itself formed part of the body; but in this case, the marginal cipher does not correspond with the body of the check, and does not bear any apparent relation to the body of the document.

If the holder of the document, by changing figures that do not vary the legal value of the instrument, or by some other fraudulent contrivance, succeeded in deceiving the paymaster and in obtaining a larger amount of money than that called for in the body of the document, he has committed the crime defined in one or the other of the before-mentioned sections cited in the opinion of Justice Collins.

Reversed and remanded.

CANAL ZONE *versus* PENNISTON.

No. 29. Argued April 9, 1907.—Decided May 6, 1907.

FORGERY. TIMEBOOKS.

The defendant made false entries of overtime in his timebooks for a laborer who did no overtime work. HELD to be forgery under Section 322 of Act No. 14 of the Laws of the Canal Zone.

Appeal by defendant from the Circuit Court of the Second Judicial Circuit of the Canal Zone; Hon. H. A. Gudger, Judge.

The defendant, a foreman, gave overtime to one of his laborers in the daily timebooks from which the pay rolls and certificates are afterward made. The evidence showed that the laborer had not performed all of the additional work.

P. P. Hillerman and *W. H. Carrington*, for appellant.
G. M. Shontz, for the Canal Zone.

LORIN C. COLLINS, J. The defendant was arraigned on an information containing two counts, charging the defendant, in the first count, with feloniously and falsely making and forging a timebook with intent to defraud the United States of America, and the evidence being heard and considered by the court, the court found the defendant guilty of forgery as charged in the first count of the information. The defense demurred to the information on the ground that the facts stated in the information do not constitute a public offense; that the timebook is not a subject of forgery; and that the information does not set forth the instrument that was altered or kept by the said defendant.

On examination of the count upon which the defendant was found guilty, the Court finds that it states the offense with sufficient certainty. If the defendant desired the timebooks to be set forth in full, he could have obtained the same through a bill of particulars.

As to the first point raised by demurrer, that the facts stated in the information do not constitute a public offense,

Section 322 of the Penal Code reads: "Every person who, with intent to defraud another, makes, forges or alters any entry in any book of record, * * * is guilty of forgery."

The evidence showed that these timebooks were original books of record and are the books from which the pay rolls of the men employed on shovel 216 were made. Any timebook or other book of record can be the subject of forgery. The proof seems clear that false entries were made in the timebook and that the same were made with intent to defraud. From a careful examination of the first count in the information, we are of the opinion that it fairly states an offense under Section 322. We think the court did not err in overruling the demurrer to the information, or in admitting evidence under the information. There were no errors of law occurring at the trial that we think necessary to consider. The court below saw the witnesses, heard their evidence, their manner of testifying, their opportunities of knowing the things in regard to which they testified, and, having found the defendant guilty, we find no reason for disturbing said finding.

Let the judgment of the Circuit Court of the Second Judicial Circuit in this case be affirmed.

The CHIEF JUSTICE concurred.

Affirmed.

UNITED STATES OF AMERICA *versus* ANDRADE.

No. 25. Argued April 15, 1907.—Decided May 6, 1907.

PUBLIC LANDS. TITLE BY CULTIVATION.

The defendant had been cultivating continuously for twenty years the land which was claimed by plaintiff as public land. Defendant claimed title by occupation and cultivation, but presented no recorded instrument of title. At the time of the original occupation, the laws provided that title by cultivation could be acquired in the following manner: The cultivator proved to the governor or prefect that the lands were public and that he had been cultivating them; he also reported the amount and the exact location of the land. The governor then gave him a provisional title which was later made final by the national Government, which gave the legal possession. The cultivator was furnished a copy of the final adjudication, which had to be registered in order to give him legal title of ownership. This final adjudication was not made to defendant.

Title could not be acquired to public lands that were to be used for public purposes, highways, canals, etc., and those adjoining highways.

The mere cultivation did not give title; without the adjudication, a cultivator acquired no legal title to the lands cultivated, nor could he convey the ownership of these lands.

It appears that the defendant was not in legal possession at the time of the cession of the Canal Zone, and that he could not have acquired legal adjudication of the land because this land was reserved for public use, being adjacent to a canal.

SAME. TITLE BY OCCUPATION.

Can be obtained only of things that have no owner. As this land adjoined a highway, it was owned by the national Government.

SAME. TITLE BY PRESCRIPTION.

Title to public lands cannot be obtained by prescription, since prescription does not run against the national Government.

SAME. IMPROVEMENTS.

A possessor in good faith is entitled to the value of the improvements made by him; the value of them to be ascertained by the Joint Commission.

Appeal by defendant from the Circuit Court of the Second Judicial Circuit of the Canal Zone; Hon. H. A. Gudger, Judge. The opinion of the lower court is as follows: "This was a civil action commenced by the United States of America, claiming to be the owner and entitled to the possession of a certain tract of land set forth and particularly described in the petition and in which it is alleged that the defendant, Antonio Andrade, is in the unlawful possession thereof. The defendant admits that he is in possession of the property named but, as his first cause, denies the right of the plaintiff to the ownership and, in the second cause, sets up title to the land by virtue of prescription. He alleges that eighteen or twenty years ago he "took up" the land in question, and that he has cultivated and occupied the same since that date, and that he is not only entitled to remain in possession, but is, in fact and in truth, the owner of the property. This plea on the part of the defendant refers to public land, and is meant to state that the identical land in question was, prior to its occupation by the defendant, "tierras baldias." If there is, or could be, a doubt as to whether or not this was intended to be an admission of that fact, the references made to the Code of Civil Procedure to sustain the defendant's contention would relieve the matter of any doubt as

all of these refer specially and only to public lands. This being true, the admission, together with the proof, sustains the contention of the plaintiff that this land is and was "tierras baldias." The plaintiff offered proof on the main question, and the defendant as to the value of the estate. In the trial there have arisen many perplexing and intricate questions, and there has been introduced a mass of matter, some of which it may not be amiss to refer to specially, and much of which seems to have little or no connection with the question at issue. The plaintiff, in order to sustain the point that title to public lands in the Canal Zone cannot be acquired in any manner, introduces a decree dated in 1867 in which all "tierras baldias" within a certain territory are withdrawn from entry and occupation, and within this limit is embraced all public lands in the Canal Zone. The plaintiff urges strongly that this decree, which from its standpoint is not only a decree but in the nature of a law, is still in force, and that therefore the defendant can neither gain title by occupancy and cultivation nor by entry; or, as it is better known here, adjudication. There has also been introduced in this case, Decree No. 92 of 1883, which withdrew from entry and occupation all public lands in the Department of Panamá; as well as No. 505, which withdrew from occupation and entry all land in the entire Republic of Colombia. In addition to this, there has been introduced the Fiscal Code, enacted July, 1873, which was a codification and re-enactment of all the legislation in regard to public lands, including other subjects, and the methods by which they might be acquired. Article 2192 on page 407 is as follows: "From the time this Code goes into effect, in all its parts, the former laws in regard to fiscal matters of the Union shall be null and void, whether they be in conflict or not with the dispositions therein contained." This clause seems to be sweeping. There has also been introduced Decree No. 138 of 1882, which repealed No. 505, and it is urged that this necessarily repeals Decree No. 92, yet there seems to be no connection between Decrees Nos. 505, 138 and 92. The defendant further insists that even if Decree No. 92 is not repealed, the same is void for the reason that it is direct conflict with the Constitution of the Republic of Colombia,

which provides that Congress, and Congress alone, shall legislate upon the subject of public lands. It would be material to decide as to the effect of these decrees if it were not for the fact that this question has taken a peculiar turn, which renders a decision upon them unnecessary.

The Court is of the opinion that the evidence justifies a conclusion that the defendant entered on this land in 1888; that he has remained from that date up to the commencement of this suit in the possession thereof; that he has built a home on the land, erected machinery, cleared up the soil, planted sugar cane, trees, etc., and has in fact, been an occupant and cultivator of the hacienda for these past twenty years. But the Court is further of opinion that, notwithstanding the length of time the defendant has occupied and cultivated the soil, he has not by that means gained a title to the land. The fact that the defendant remained in undisturbed possession of the land for such a length of time, and that he has improved the same, would certainly give him a moral right, if indeed he has not a legal one, for any and all improvements that he has placed on the land. The Court does not go into the question of these improvements, or the value of the same, for the reason that there has been no evidence which has set forth in a tangible form and with reasonable certainty or clearness, the amount of the improvements, the kind and character of the same, and their value. It will be noted that in the evidence of Mr. Popham he refers to a house, distillery, the plantation of cane, trees, etc., and closes his statement with the fact that he offered the defendant for the "hacienda de Andrade" $100,000. The next witness followed exactly in his footsteps and estimated the whole property, without making any division as between the land and the improvements, at about the same figure. It will be seen at a glance that it is utterly impossible for the Court to form any just or correct conclusion of the value of the improvements, if indeed it felt that under the law it was its duty to go into this question. It is true, the defendant does not raise the question of improvements in his answer, yet, if it be true that Andrade, without such being specially pleaded, would, under certain conditions, be entitled to certain improvements, the burden is on him as to

this question, and he has not fulfilled that obligation when he proves that the land claimed by the plaintiff is worth $100,000, making no distinction between the value of the soil and the value of the improvements and things on the land which do not of right pass with the land. The question is, if the land is worth at the present time, including everything located thereon, $100,000, and there is no proof as to how much the value of the land is, as to how much the value of the real improvements is, and what is the value of the movables, how can it be decided as to the worth of either one of these separately and disconnect it from the whole? The defendant in this action was represented by learned counsel, and it is to be supposed that he managed the case to the best interests of his client, and the fact that the entire evidence was closed and the announcement made by him that he had nothing further to offer to the Court and no suggestions as to any other methods or mode of procedure, or manner of taking testimony, indicates clearly that he was satisfied with what appeared in the record as proof; and, under these circumstances, it would seem highly improper for the Court to undertake any initiative on other lines demanding further testimony. It will further be noted that the Court does not take into consideration any question of improvements on the property for the reasons stated, but leaves this question for such action as the defendant may deem proper to undertake in the future, if indeed he has any action at all. The Court finds the following facts:

First—That the lands in question are public lands, and that, as such, they are the property of the United States of America;

Second—That twenty years' occupation and cultivation of these lands by the defendant is not sufficient as against the United States to give him a title to the land;

Third—That the defendant has failed to offer proof by which any adequate amount of improvements could be awarded him in case the Court had felt authorized or warranted to go into the question of improvements, which point has not been passed upon for the reasons stated.

It is therefore ordered, adjudged and decreed by the Court that the plaintiff, the United States of America, do have and

recover of the defendant, Antonio Andrade, the possession of the lands described in the complaint, bounded and set forth as follows:

"'Hacienda de Andrade,' an approximate area of seventy-five acres, more or less. It reaches from east to west from Kilometer 41 to Kilometer 43, more or less; on the south its boundary consists of a wire fence running parallel to the center line of the canal at a distance from the latter of about forty-four meters, more or less. As the center line of the canal is about one hundred ninety meters distant from the central location of the town of Gorgona (accepting as such the plaza where the Catholic church stands) the distance from the southern boundary of the Hacienda Andrade to the said central location of the town measures, more or less, two hundred fifty meters. From south to north the property measures, more or less, six hundred meters in its greatest width, that is, from the gate of entrance to same, located in the aforementioned wire fence, *i. e.*, on the southern boundary, in a straight line north."

It is further ordered, adjudged and decreed that the plaintiff do recover of the defendant, Antonio Andrade, the costs of this action, to be taxed by the clerk."

Oscar Terán, for appellant. *G. M. Shontz*, for respondent.

F. MUTIS DURÁN, C. J. On the 9th day of November, 1906, the United States of America filed a petition in the Circuit Court of the Second Judicial Circuit against Antonio Andrade, asking for the restitution to the Government of the United States of a certain piece or parcel of land lying on the outskirts of the town of Gorgona, which defendant occupies with a dwelling house and outbuildings, an aguardiente distillery, sugar cane and banana plantation and pastures. The description of the land is fully set out in the complaint.

It is alleged in the petition that these lands are tierras baldías or public lands and were set aside for public use by the Colombian law, and as such are absolutely owned by the Government of the United States of America as successor to the Republic of Panamá and its predecessor, the Republic of Colombia; that the tierras baldías or public lands situated in the boundaries of the Canal Zone, including the aforesaid

land held by the defendant, are not and have never been, since 1850, open to appropriation by any person or corporation except the Panamá Railroad Company and the Compagnie Nouvelle du Canal de Panamá, nor could these titles therein be acquired by cultivation, prescription or occupation; and that the defendant held the land in bad faith.

Summons being duly served upon the defendant, he filed his answer to said petition on the 19th day of November, 1906, and admitted that he was in possession of the land described in the complaint and claimed the ownership of the property set out in the petition. He denied the allegation that the land is, and always has been, tierras baldías or vacant lands; that the tierras baldías or vacant lands situated within the boundary of the Canal Zone, Isthmus of Panamá, were not assigned for public use by the Colombian laws and that said lands as such are absolutely owned by the United States of America as successor to the Republic of Panamá and its predecessor, the Republic of Colombia; that tierras baldías or vacant lands situated within the boundaries of the Canal Zone, including the aforesaid land held by the defendant, are not, and have never been, since 1850, open to appropriation by any person, and that the titles therein could not be acquired by cultivation, prescription or otherwise; and that he held the property in bad faith.

On the issues thus joined a trial was had, consisting mostly of documentary evidence, the Colombian laws, the laws of the Republic of Panamá and the Executive Decrees and Official Gazettes of both Governments. On the 22d day of January, 1907, judgment was rendered against the defendant in the said cause, and the United States of America adjudged to have and recover of the defendant the possession of the land described in the petition and that the complainant recover of the defendant the costs of the suit. A motion for a new trial was entered on the 24th day of January assigning several grounds for the motion and on the 29th was overruled. To the overruling of said motion, defendant duly excepted and the case comes to this court on appeal from said judgment and from said order overruling the motion for a new trial.

The pleadings and the evidence show that Antonio Andrade,

about twenty years ago, settled on the land in question, comprising over one hundred hectares, and has been continually cultivating the same since that time. There is nothing in the pleadings or evidence to show any other title in the defendant than that of occupation and cultivation for the said period.

The Fiscal Code, in force in the Republic of Colombia at the time Andrade claims original occupation, defines public lands as being all lands not appropriated with legitimate titles. Art. 5. Legitimate titles, according to the Civil Code (Art. 673) are obtained by occupation, accession, tradition, succession "mortis causa" and prescription.

By occupancy, ownership is acquired of things that belong to nobody. Art. 685 of the Civil Code. A title by accession, succession, or tradition does not apply in this case, as it has not been alleged by defendant.

By prescription, public lands cannot be acquired. Art. 3 of Law 48 of 1882.

As the defendant has not alleged possession by virtue of one of the aforementioned titles, and as the only one he alleges is that of cultivation, it is clear from this that the land claimed was not appropriated with legitimate title, and that it is therefore public land. In order to acquire public land by cultivation, there were in force at the time Andrade claims original occupation (about twenty years ago) Laws Nos. 61 of 1874 and 48 of 1882, also Article 933 of the Fiscal Code of Colombia, with reference to such acquisition of land, which laws provided that whoever cultivated public land of the nation acquired the right of ownership to them by virtue of such cultivation, and would be considered as owner in good faith of such land, and could not be dispossessed of same except by due process of law. The laws read as follows:

Article 1, Law 61 of 1874: "Every person who occupies public lands belonging to the nation, *which lands have not been set aside* for any special use by any provision of the law, and shall erect a dwelling on and cultivate such land, shall acquire the right of ownership to such land, whatever the amount of same might be."

Article 2, Law 48 of 1882: "Cultivators settled on pub-

lic lands with dwelling and cultivating such lands, shall be considered as possessors in good faith of such lands, and shall not be deprived of the possession of such lands, except by due process of law."

Article 933 of Fiscal Code of Colombia: "Colombians that shall have settled on public lands, claiming same by virtue of cultivation, and who have actually cultivated such land, shall not be disturbed in the use and enjoyment of such land by any person claiming said land by virtue of title by adjudication; provided, however, that they prove with due title *by adjudication* that they are the owners of the land by virtue of being cultivators of same."

These laws were enforced by the Government of Colombia through the power vested in the Chief Executive to enforce Fiscal and administrative laws. Executive Decree No. 832 and Circular No. 94 of the same year, both published in the "Gaceta Oficial" of Bogotá, No. 6230. In accordance with the provisions of said Executive Decree and Circular beforementioned, in order to acquire the right of ownership to public lands by cultivation, it was necessary to prove that the lands is question were public lands, and that they were being cultivated by the party claiming them, he reporting to the Governor or Prefect of the territory the amount of land taken up and the exact location of same, as well as the fact of its being under cultivation; this for the purpose of having such land delineated. Art. 3 of Decree No. 832.

Furthermore, it was provided in the same decree and circular that the Governor or Prefect should provisionally adjudicate such land to the party claiming same, and that afterward, all the provisions of said decree and circular having been complied with, the national Government should approve such provisional adjudication, and then definitely adjudicate such land to such party, giving legal possession to the interested party, together with a copy of the final adjudication, in order that such adjudication might be registered. The copy so registered would constitute the legal title of ownership to such land so adjudicated. Paragraphs 16 to 18 of Circular No. 94.

Paragraph 18 of Circular No. 94: "Once that legal possession has been given to the cultivator, and proof of such

legal possession has been recorded, the authority that has given the legal possession shall also give to the cultivator or colonist a certified copy of the final adjudication; which copy, when registered, shall constitute a legal title of ownership of such land."

The legal possession of land thus adjudicated was to be given to the interested party in accordance with Art. 932 of the Fiscal Code, which reads as follows: "When the adjudication made to one or more persons is made by virtue of their being cultivators or colonists, possession to the land adjudicated shall not be given by judicial authority, but by administrative authority, for which purpose the Governor of the State, or the Prefect of the territory in which such lands are located, shall direct that legal possession to such lands shall be given to the interested parties, at the same time issuing them a certified copy of the resolution of the Secretary of Finance granting adjudication, which certified copy shall to all effects constitute a legal title of ownership to such land."

Public lands to be used for public purposes, such as roads, docks, wharfs, canals, harbors, etc., were not liable to adjudication to individuals, according to Arts. 882 and 918 of the Fiscal Code, which read as follows:

Art. No. 882 of Fiscal Code: "The public lands which in the judgment of the Executive Power *are not considered necessary for public use*, can be granted to individuals by sale for cash, or in exchange for Government bonds, in accordance with paragraph 1 of Arts. 868 and 869."

Art. No. 918 of Fiscal Code: "Provisional adjudication shall not be given if in the judgment of the Governor or Prefect of the territory the public lands in question, or any part of them, *should be reserved for public use:* such as, roads, town sites, forts, harbors, arsenals, docks, canals, etc."

Art. 947 of the Fiscal Code contains the same prohibition as Art. 946, with regard to public highways, and therefore, to canals; reserving to the nation the right of use of all public lands adjoining such highways. This for the purpose of adjudicating them to the companies undertaking the enterprise of constructing such highways. Art. 948.

From the foregoing it can readily be seen that although

Laws 61 of 1874 and 48 of 1882 granted the right of ownership to the cultivators of public lands, the mere cultivation of such lands did not in itself constitute a legal title of ownership to the lands, under the Colombian Government before 1903, in which year the Department of Panamá seceded from the Republic of Colombia, transferring to the United States the following year, 1904, all the rights of control and sovereignity that it possessed in the territory of the Canal Zone.

Without the adjudication, above referred to, made by the national Government, a cultivator of public lands did not acquire legal right to such lands so cultivated, but acquired only the right of having such lands adjudicated to him, *i. e.*, a mere expectancy or expectation (derecho presunto) of acquiring legal right to the lands; and such lands are public lands until thus adjudicated. Decrees (resoluciones) of October 10 and November 23, 1894, Official Gazette of Bogotá, Nos. 9611-9646. Without the adjudication referred to, the cultivator could not transfer the right of ownership of such lands claimed through cultivation. Paragraph 8 of Art. 1 of Decree 832. Therefore he would not have the right of ownership of such land, according to Art. 669 of the Civil Code, which defines the right of ownership.

It appearing from the above that the appellant in this cause, defendant in the court below, was not in legal possession by adjudication of the land in question before February 23, 1904, on which date the Republic of Panamá transferred to the United States all the rights of control and sovereignty over the territory of the Canal Zone; and it further appearing that the defendant could not have obtained legal adjudication of the land in question from the Colombian Government at the time he claimed original possession, for the reason that such land being adjacent to a public highway (a canal) was reserved for public use, in accordance with the Colombian law in effect at the time, the Government of the United States having assumed all rights of control and sovereignty of the Republic of Panamá over said territory, has the right to revendicate such public land as it may deem fit.

In regard to the rights of settlers upon public lands, Law

48 of 1882 contains, besides Art. 2 above quoted. Art. 5, which reads as follows:

Art. 5 of Law 48 of 1882: "In case a cultivator should be deprived of his property through due process of law, he shall not be dispossessed of the land occupied by him without first being indemnified to the extent of the value of the improvements made on the land, as possessor in good faith of the land.

"Improvements shall consist of clearing of the land, embankments, cultivation and dwellings, the value of which shall be appraised by experts, as provided for in the Judicial Code of the nation or of the state in which the adjudicated land is located.

"Until the value of such improvements shall have been paid, there shall not exist against the possessor any action for ejectment from the land."

The defendant, besides being considered to all effects by law as a possessor in good faith of the land occupied by him, and having occupied it indisturbedly with the knowledge and consent of the Colombian authorities, is entitled to the right provided for by Art. 739 of the Civil Code, which article provides for the payment of the improvements made on the land.

The sixth article of the Treaty determines how the damages to the owners of private lands or private property shall be ascertained, should they be deprived thereof by reason of the grants contained in the Treaty. It further provides that: "No part of the work on said canal or Panamá railroad, or on any auxiliary works relating thereto and authorized by the terms of this Treaty, shall be prevented, delayed or impeded by or pending such proceedings to ascertain such damages." The Court, taking into consideration the foregoing, affirms the judgment of the lower court in denying the motion for a new trial and in recognizing the right of the plaintiff to revendication of the land in dispute, the same not being open to appropriation (Art. 918 of the Fiscal Code); and said prohibition against appropriation having been publicly declared by Executive Decree, which decree was fully within the executive prerogative, the same being but declaratory of the existing laws and in aid thereof.

The decision of the lower court as to the improvements on the property is reversed, and it is ordered, adjudged and de-

creed, as to the full, fair and adequate value of said improvements and the ascertainment thereof, that it is a matter of inquiry for the Joint Commission of the United States and the Republic of Panamá, pursuant to the terms and provisions of Arts. VI and XV of the said Treaty. The costs of this appeal to be paid by the plaintiff.

JUSTICE COLLINS concurred.

Affirmed in part and reversed in part.

ANDRADE *versus* PANAMÁ RAILROAD COMPANY *et al.*

No. 24. Argued April 15, 1907.—Decided May 6, 1907

PUBLIC LANDS. INJUNCTION AGAINST DAMAGE.

An injunction will not be granted against employés of the Panamá Railroad Company for damages caused by them to improvements made on public lands by the occupant of such lands. The damage caused shall be appraised by the Joint Commission but the work of the canal or of the railroad shall not be impeded pending such appraisal.

Appeal by plaintiff from the Circuit Court of the Second Judicial Circuit of the Canal Zone; Hon. H. A. Gudger, Judge.

Plaintiff has been occupying certain lands that were decided in a former case (United States v. Andrade) to be public lands, and has extensive improvements thereon. He asked for an injunction against the Panamá railroad and the general manager for damages that were being done to the land and to the improvements by the construction of tracks and a dump. The proof showed that the work was being done for the Isthmian Canal Commission only.

T. C. Hinckley and *Oscar Terán*, for appellant. *G. M. Shontz* and *Inocencio Galindo*, for respondent.

F. MUTIS DURÁN, C. J. This cause comes before the court on appeal from the Second Judicial Circuit, for an injunction against the Panamá Railroad Company. Motion for a new trial was made by plaintiff and was denied by the lower court.

It appears from the records in this case that the tract of land referred to by the appellant, plaintiff in the lower court, is the same as that claimed by the Government of the United States in a previous suit brought against the plaintiff in this case. This former case has been decided by the Court in favor of the Government of the United States, declaring that this tract of land is public land, and therefore that the plaintiff in this case has not legal possession of the land.

It appears, furthermore, that this being an action for injunction or temporary restraining order against the Panamá railroad, the case comes under the provisions of Art. 6 of the Treaty between the United States and the Republic of Panamá, for the construction of the canal, which article provides that when the private rights of individuals shall conflict with the rights granted to the United States by said treaty, for the construction, maintenance and operation of the canal, the rights of the United States shall be superior; that all damage caused to the owners of such private lands or property shall be appraised and settled by a joint commission appointed by both governments; and that no part of the work of said canal or Panamá railroad or any auxiliary works relating thereto, authorized by the terms of this treaty, shall be prevented, delayed or impeded by or pending such proceedings to ascertain such damage.

This being the case, and the Court having decided that the land in question does not belong to the plaintiff in this case, an action for injunction does not apply, and therefore the Court affirms the decision of the lower court in denying the injunction.

JUSTICE COLLINS concurred.

Affirmed.

CANAL ZONE *versus* RASEINDO.

No. 30. Argued October 14, 1907.—Decided November 18, 1907.

FORGERY. INFORMATION. PRECISION.

The information must be sufficiently definite to put defendant on notice; it must charge a specific crime. In forgery, the forged instrument should be set out.

SAME. VARIANCE.

The forged instrument was a pay certificate of "The United States Isthmian Canal Commission" while the information charged the forgery of a "due-bill, order or request for the payment of money by the United States of America" HELD to be a variance between the information and the proof.

Appeal by defendant from the Circuit Court of the Second Judicial Circuit of the Canal Zone; Hon. H. A. Gudger, Judge.

THE facts appear in the opinion.

S. B. Dannis, for appellant. *Thos. E. Brown, Jr.*, for the Canal Zone.

LORIN C. COLLINS, J. An information was filed in the Circuit Court, charging the defendant with making and forging a due-bill, order or request for the payment of money by the United States of America, with intent then and there the Government of the United States of America to injure and defraud; secondly, with falsely uttering and publishing; and in the third count, with passing or attempting to pass the aforesaid instrument. There was a plea of not guilty, a finding of guilty on the trial and a sentence on the finding of one year in the penitentiary. The case is brought here on appeal and the point raised is that there was a variance between the information and the proof.

The instrument offered at the trial was in words and figures as follows:

"Certificate E No. 7162.—Employee's No. 75416.—Audit Pay No. 162.—Department Engineering and Construction, Division Municipal Engineering, Location Gorgona.—The United States

Isthmian Canal Commission Pay Certificate.—Audit Roll No. 3065.—Amount $40.80.—I certify that there is due Joaquin Raseindo the amount of wages stated herein as evidenced by a duly approved pay roll, and same is payable to him upon presentation of this certificate to the Disbursing Officer, properly receipted and signature witnessed, when properly examined. Not negotiable; payable only to the person to whom drawn if presented within 60 days after close of pay period Examined.—Edward J. Williams, Disbursing Officer.—I hereby acknowledge to have received from Edward J. Williams, Disbursing Officer, the sum of Four and 80/100 dollars in Panamanian silver in full payment for services rendered during the half month ended 15 Mar. 1907, 190.... (Signed) F. O. Heath, witness to signature. (Signed) Joaquin his X mark Raseindo, employee's signature."

In the case of the Government *v.* Colinas, the Court used this language in speaking of the averment as to forgery where the instrument was described as in the case at bar: "The Court is of the opinion that there is a variance between the pay certificate offered in evidence and the first count in the declaration, in that the said pay certificate is not a due-bill, order or request for payment of money by the United States of America."

We assume that this information was filed prior to the rendition of the opinion in the above entitled case. However that may be, it was the deliberate decision of the Court and should be sustained unless it appears that the Court erred.

Bishop says in his New Criminal Procedure, Vol. 1, Section 98: "Under every sort of constitution known among us, an indictment which does not substantially set down, at least in general terms, all the elements of the offense—every act or omission which the law has made essential to the punishment it imposes—is void. And, besides this, under most of our constitutions the allegation must descend far enough into the particulars, and be sufficiently certain in its frame of words, to give the defendant reasonable notice of what will be produced against him."

And in the same volume, Sections 517, 518, 519 and 520:

"The Rights of Defense,—to persons accused of crime, are among the most sacred in law. Largely they give form to the indictment, which in various circumstances, it is said, will be good if it does not prejudice them. For—
The Protection of the Innocent—is the highest duty of a govern-

ment. And an innocent man, as every defendant is presumed to be until convicted, can know nothing of what is to be brought against him beyond what is set down in the indictment. Hence
Precise and Full Allegation,—which one conscious of crime would not need, is essential to him who would make a just defense against a false charge; and such, in the eye of the law, is every indicted person previous to conviction. And
Guessing at Meaning.—The indictment against an innocent defendant, being what every indictment is presumed to be, must, to be adequate, be in distinct and full terms, so plain as to preclude the necessity of guessing at the meaning. Men differ as to their capacity of comprehension, so that justly the law never punishes one for inability to comprehend a meaning not set down in exact words. Therefore—Every Fact,—as already shown, which is essential in a *prima facie* case of guilt, must be stated; otherwise there will be at least one thing which the accused person is entitled to know, whereof he is not informed. And that he may be certain what a thing is, it must be charged expressly, and nothing left to intendment. All that is to be proved must be alleged. For example,—In Attempt—if it is by statute punishable to shoot at one with intent to kill him, an indictment is ill which simply charges the shooting with intent to kill, not saying whom; because, though probably the person shot at was the one meant, the defendant is entitled to know all without drawing on his reason or imagination. Hence—
Precision is, said Gibson, C. J., 'of the last importance to the innocent; for it is that which marks the limits of the accusation and fixes the proof of it.'"

All of the text writers hold that the information must charge a specific crime. This also is the law of the Canal Zone, as the perusal of pages 169 and 172 clearly reveals. Paragraph 6, Section 77 reads as follows: "That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."

Had the Government on the trial offered a counterfeit legal tender note, would it not have fitted perfectly the description of the forged instrument? Or would not a United States bond have equally well fitted to the description? Or a post-office order, or any of the various due-bills or obligations of the United States?

It must be clear to all minds that a pay certificate of the

Isthmian Canal Commission, for the purpose of criminal pleading, is not within the description employed in this information. The intention to defraud the United States might be sustained as laid here; but it would be such unnecessarily hazardous pleading that it should be condemned. The defendant is entitled to have the information so certain that he could plead former conviction or jeopardy as the case might be.

There cannot, we believe, be found in any form book or treatise on pleading a form of indictment for forgery which does not require the instrument itself to be set out in *haec verba*. This should be done in all cases.

There is not only a variance which is fatal to the judgment, but the information is so faulty that it cannot sustain a judgment. There are no facts necessary averred or alleged in the entire information which constitute a crime. The pleader has formally submitted to the Court the conclusions to which he has arrived that a crime has been committed and the defendant is put on trial for forgery of anything within the range of a due-bill, order or request for the payment of money by the United States of America.

Let the case be reversed and remanded for further proceedings in conformity with the views here expressed.

The CHIEF JUSTICE concurred.

Reversed and remanded.

CANAL ZONE *versus* HARDEMAN.

No. 36. Argued January 13, 1908.—Decided February 1, 1908.

JURISDICTION. EMBEZZLEMENT.

Money entrusted to defendant that should have been kept in an office in the Canal Zone, was taken therefrom by defendant and carried into the Republic of Panamá, and there converted or lost. HELD, that the Canal Zone has jurisdiction, since the wrongful intent of the defendant to convert the money is presumed to have existed when he left the office with the money.

Appeal by defendant from the Circuit Court of the First Judicial Circuit; Hon. F. Mutis Durán, Judge.

THE facts appear in the opinion.

T. C. Hinckley, for appellant. *G. M. Shontz*, for the Canal Zone.

LORIN C. COLLINS, J. The defendant was indicted in the First Circuit for embezzlement of $853, lawful money of the United States of America. He was found guilty and sentenced to the penitentiary at hard labor for a term of two years. The following statement of facts was agreed upon by the attorneys in the cause:

"This was an action brought in the above named court by information filed on the 16th day of November, 1907, charging the above named H. J. Hardeman with the offense of embezzlement. The trial of said case was set for hearing on Saturday the 23d day of November, at which time said trial took place at the court house in the First Judicial Circuit. The facts of the case as developed from the testimony, disclosed that the defendant was and had been in the employ of the Isthmian Canal Commission in various capacities for some considerable time; that for a short time, up to and including the 25th day of October, 1907, the defendant was in charge of the quarantine station at La Boca, Canal Zone, as custodian thereof during the absence of one Mr. Swann, the regular custodian, who was on vacation leave; that on the

25th day of October, 1907, one E. H. Baldwin, who was a passenger on board a steamer coming from Guayaquil, Ecuador, was taken to said quarantine station and there held in quarantine; that he came on said steamer as a steerage passenger; that shortly after reaching the quarantine station he asked the defendant, H. J. Hardeman, if he (Baldwin) could not obtain the same accommodations at said quarantine station as first-class passengers received, to which the defendant answered that he could by paying an additional fee, which said Baldwin agreed to do; that Baldwin inquired of some attendants around the quarantine station whether or not the defendant, Hardeman, was the officer in charge or custodian thereof, and was informed by such attendants that he was; that he (Baldwin) asked Hardeman whether or not he was the officer or custodian in charge of the station and was informed by defendant that he was in charge; that thereupon he asked the defendant if he would keep some money for him (Baldwin) during the time he was detained in said quarantine station, to which the defendant replied that he would, whereupon said Baldwin counted out to said defendant the sum of $853, American currency, of which approximately $600 was in American gold coin, the balance thereof being in paper money, American bills; that this money was given to Hardeman, the defendant, some time during the afternoon of October 25, 1907; that Hardeman gave to Baldwin a receipt therefor; that some time subsequent and during the same afternoon Baldwin asked the defendant if he would exchange the gold coin into United States paper money, to which the defendant agreed; that on the morning of October 26, 1907, Mr. Swann, the regular custodian of said quarantine station, returned from his vacation leave and assumed charge of said station; that the defendant, Hardeman, on the morning of October 26, left said station, taking with him the $853, so deposited with him by said Baldwin for safekeeping, and went to the International Banking Corporation in the city of Panamá and had the gold coin exchanged for paper currency; that Hardeman went from the International Banking Corporation in the said city of Panamá to the city of Colon by the ten o'clock train on the morning of October 26, 1907; that as soon as

he reached Colon he went to the Astor House in that city and had some drinks and lunch; that immediately thereafter he went to various places in Cristobal and Colon, particularly in Cristobal, seeking employment, as he was under the advice that his name would be taken from the rolls in the department in which he was employed up to that time, namely, in the quarantine station at La Boca, on the 15th day of November, and that he had the time between the 26th day of October and said 15th day of November in which to secure a transfer to some other department; that after seeking the transfer to some other department, he then went to various houses of ill repute, and during the night of October 26, he stayed at the house called the 'Navahoe' in the city of Colon and claims to have spent between $40 and $50 American currency, which was his own money; that on the morning of October 27, in the neighborhood of nine o'clock, he went to another house of ill fame in the said city of Colon known as 'The Mascot,' conducted by one Mrs. Pearl Corrigan; that he called for her and when shown into the house and to her presence asked her if she desired to sell her place. She answered that she would, provided the terms were satisfactory; that Hardeman then offered Mrs. Corrigan a certain sum of money for said place known as 'The Mascot' and agreed to pay down the sum of $500, saying that he had more money but could not pay any more than that sum down. This proposition was refused by Mrs. Corrigan. Then Hardeman asked her if she was any relation to the Corrigan brothers, he claiming to know them, and when she replied that she had married Jimmy Corrigan, he asked to see her husband. When he did so he asked the said Jimmy Corrigan to use his influence with Mrs. Corrigan, his wife, to assist him (Hardeman) in buying 'The Mascot' for the sum which he had offered Mrs. Corrigan, namely, the sum of $1,600. At this time there appeared one Mr. West and also his wife, who heard a part of the conversation between Mr. and Mrs. Corrigan and Hardeman; that there were a few drinks had at this time and that Hardeman went away; that he roamed about the streets of Colon during most of the day, going from one place to another, and that about four o'clock of the afternoon of said day he was taken to the

Astor House by a Colon policeman and a plumber of said city for the purpose of permitting the proprietors of said Astor House to take a roll of money which he had frequently displayed during the day, because of the fact that he was intoxicated and it was feared that he would lose his money; that about five o'clock the same afternoon he again went back to 'The Mascot' and there saw Mr. and Mrs. Corrigan about to leave the place for the purpose of taking a drive; that he had a few words of conversation with Mr. and Mrs. Corrigan when Mrs. Corrigan called to Mrs. West to take him, Hardeman, upstairs and put him to bed; that Mrs. West did so, and the next time that Hardeman saw the Corrigans was about ten o'clock that same night when he called Mr. Corrigan out of the room and told him that he (Hardeman) had been robbed of his money and that he thought he had been robbed in that house, namely 'The Mascot.' Corrigan then went with Hardeman to the Astor House in said city of Colon and there reported the loss. It seems that Hardeman elicited the aid of a Colon policeman in an endeavor to locate the money he claimed to have lost. Hardeman was arrested in Colon on Monday or Tuesday evening following the above dates; that Hardeman never paid back to the said Baldwin the money so deposited with him (Hardeman) or any part thereof; that Baldwin on Sunday afternoon, October 27, as he was about to be released from the quarantine station, asked Mr. Swann, the custodian in charge thereof, for the return of said money, presenting at said time the receipt which had been given to him by the said Hardeman."

A reversal is sought on the ground that the crime, if any, was committed in the Republic of Panamá and not in the Canal Zone. An examination of the evidence shows that Mr. Swann, who was in charge of the quarantine station, returned from his vacation on the morning of October 26, 1907. The same morning the defendant left the station taking with him the $853 deposited with him by Mr. Baldwin for safekeeping, and went to the International Banking Corporation in the city of Panamá and had the gold coin exchanged for paper currency; that Hardeman went from said bank in said city of Panamá to the city of

Colon on the ten o'clock train on the morning of October 26, where he engaged in a drunken debauch.

Section 11 of Act No. 14 of the Laws of the Canal Zone reads: "In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence."

Section 12 reads: "The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused. * * * A malicious and guilty intention is presumed from the manner and deliberation with which an unlawful act is intended or committed for the purpose of injuring another."

"Every person is presumed to contemplate the ordinary and natural consequences of his own acts." Greenleaf on Evidence, Section 14. When Hardeman met the regular custodian of the quarantine station, he might, had he no criminal intent, have turned over to Swann the money that had been entrusted to him for safekeeping. Had he no criminal intent he need not have taken to the International Banking Corporation the entire $853 deposited with him by Baldwin, but need only have taken the gold which he had been requested to change into United States bills. The defendant said nothing to the regular custodian of his being in possession of this money. To have taken the ten o'clock train for Colon on that date, he must have left La Boca before nine o'clock and his failure to return with the money, his hastening to the first train leaving Panamá, his subsequent conduct, his using the money as if it were his own and agreeing to deposit some of it for the purchase of the "Mascot," all shows that in his actings and doings he was treating this money as his own. Therefore, from his acts there is no inference that can be drawn other than that of a criminal intent at the time that he took the money from the quarantine station on October 26. Had the accused no intention to embezzle this money, would he not have explained to Baldwin that he was about to leave the station; offer to return the money to him, or suggest that Swann would have the gold converted into United States bills. But he did none of the things and left the end of the Isthmus where Baldwin was, his departure being almost in the nature

of a flight. The conduct of the defendant clearly reveals a criminal intent.

We discover no error in the record and are of the opinion that the judgment of the First Judicial Circuit should be affirmed.

JUSTICE GUDGER concurred.

Affirmed.

ACEBO *et al. versus* GARAVEL.

No. 35. Argued January 20, 1908.—Decided March 26, 1908.

EJECTMENT. MESNE PROFITS.

A possessor in good faith of the property of another need not account to the owner for the profits accrued prior to the institution of suit for ejectment, but only for those accrued during pendency of the suit.

PUBLIC DEED. HUSBAND PURCHASING FOR WIFE.

Plaintiff bought property by public deed in his own name, but later recorded a declaration that he had bought the property for his wife with money belonging to her.. HELD that this declaration did not cancel the former deed and that the wife was not the owner of record.

Appeal by defendant from the Circuit Court of the Third Judicial Circuit of the Canal Zone; Hon. Lorin C. Collins, Judge.

THE facts appear in the opinion.

Oscar Terán, for appellant. *W. H. Carrington*, for respondent.

F. MUTIS DURÁN, C. J. This is a suit for the recovery of a certain house located in Tabernilla, bought by Amador Acebo and his wife Caridad Galán Acebo against José Garavel, before the Judge of the Third Judicial Circuit, in which the plaintiff prayed for the ejectment of the defendant from the property. The court below found the issues in favor of the plaintiff, declaring the house in question to be the property of plaintiff's wife, Caridad Galán Acebo, and ordering the delivery of same by defendant José Garavel to

plaintiff on payment by plaintiff to defendant of the sum of $533.75 United States currency, as the difference in favor of defendant between credits allowed plaintiff and credits allowed defendant. Motion was made by defendant for a new trial which motion was overruled by the court below, whereupon notice of appeal to this court was entered by defendant and appeal granted.

The lower court declared defendant to be possessor in good faith of the house in question; since defendant was in possession by virtue of a just title of ownership issued by judicial decree, in consequence whereof, title of defendant was acquired in good faith. Art. 764 *et seq.* of Civil Code of Panamá. In the same judgment, however, defendant is debited with the sum of $1,082.50 Panamanian currency, as having been received by him as rents during his occupancy to the date of the findings of the lower court; $200 Panamanian currency of said sum, however, being for rents received by defendant since the filing of his answer to the suit; leaving a balance of $1,067 Panamanian currency, between credits allowed plaintiff and credits allowed defendant, in favor of defendant.

Furthermore, it does not appear that deed No. 209 of October 8, 1887, was cancelled by document No. 39 of April 19, 1892, by which latter document plaintiff Acebo claims to have bought the house in question with money belonging to his wife, as this latter document, No. 39, in order to have cancelled the former, deed No. 209, would have had to be a deed of transfer of property; and not being such, as from its nature it only appears to be a declaration by plaintiff setting forth the fact that the house in question had been bought with money belonging to his wife, and therefore not a deed of transfer, it could not have cancelled the former; aside from the fact that such a deed of transfer from husband to wife would not be legal. Civil Code of Panamá, Art. 1852. Therefore, as deed No. 209 of October 8, 1887, could not have been cancelled by document No. 39 of April 19, 1892, the house in question could not have been the property of Caridad Galán Acebo, as declared in the judgment of the lower court.

The court below having declared defendant to be the

possessor in good faith of the house in question, erred in allowing to plaintiff the mesne profits collected by defendant before the filing of his answer to the complaint. Art. 964 of the Civil Code of Panamá. According to the last paragraph of this article, the bona fide possessor is not obliged to make restitution of the rents collected before the filing of the answer to the suit. Therefore defendant should not have been debited with the amount corresponding to the rents received prior to the filing of the answer to the complaint, but only with the amount received afterward; *i. e.*, the $200 Panamanian currency before mentioned.

It is therefore considered by the court that a new trial be granted, as prayed for by appellant.

JUSTICE GUDGER concurred in the order for a new trial.

Reversed and remanded.

GOVERNMENT OF THE CANAL ZONE *ex rel. versus* GALINDO.

No. 39. Argued May 11, 1908.—Decided May 23, 1908.

ATTORNEY. DISBARMENT OR SUSPENSION.

It is unprofessional for an attorney to open or conduct negotiations with the clients of other attorneys.

Petition for disbarment filed by C. P. Fairman, relator.

THE facts appear in the two opinions.

Thos. E. Brown, Jr., Acting Prosecuting Attorney, for plaintiff. *W. H. Carrington*, for defendant.

LORIN C. COLLINS, J. A petition was filed in this court on the relation of C. P. Fairman against the above named respondent, asking for a rule on him to show cause why he should not be suspended or disbarred, as the case may be, from practice in the courts of the Canal Zone on account of the facts set out in the said petition.

It appears from the petition that Mr. and Mrs. Burat

were engaged in a lawsuit with Dr. Bonis in regard to certain property in the city of Colon; that an action had been brought for restitution in the Circuit Court of the Republic of Panamá at Colon; that at the time the acts complained of took place, a suit was pending and undisposed of. The Burats realizing their inability, by reason of the delay incident to trials in the courts of Panamá to obtain prompt and speedy relief, retained the services of the relator to assist them with the authorities of the Canal Zone and the Panamá Railroad Company in righting their wrongs. The relator, as attorney for the Burats, on January 28, 1908, wrote the letter which is set out in full in the petition, to Mr. R. Yung, land agent for the Panamá Railroad Company, Colon. In this letter the relator, in general terms, informed Mr. Yung of the nature of the wrongs which the relator claimed had been perpetrated upon the Burats, and closed his letter as follows:

"As indicated in our prior conversation, I desire to make the following request and proposition for your consideration and submission to Mr. Slifer:

"1. The Railroad Company to grant me permission to institute the necessary proceedings to cancel the leases and extensions thereof, heretofore given to Moril Burat and Martha Burat on lots numbered 621, 623 and 625.

"(a) After the termination of the proceedings, possession of the property being again vested in the Railroad Company, that it make such disposition thereof as the facts and circumstances will justify, but if there has been no misrepresentation on the part of Mrs. Burat or her attorney, to again lease the property to her under the terms of a lease or leases such as the Company may be able to grant.

"If there are any further requirements on the part of the Railroad Company, for which provision is not made herein, as a condition precedent to the granting the above request, she will gladly comply with the same, if in her power so to do.

"Thanking you in advance for your favorable consideration of this somewhat unusual request and in the hope that Mr. Slifer will not find it incompatible with the duties of his position to render the desired assistance, I am,"

Mr. Yung on receiving this wrote a letter to Mr. H. J. Slifer, General Manager of the Panamá Railroad Company, giving additional information. Its general tenor was favorable to the proposition submitted by the relator.

On February 5, 1908, Mr. Slifer wrote to Hon. G. M. Shontz, attorney for the Panamá Railroad Company, enclosing to him certain enclosures and stating that, though the Panamá Railroad Company was not interested in the matter, he had no objection to assisting in dispossessing the present holder of the property, if Mr. Shontz thought it wise to do so, concluding with the request to let him have Mr. Shontz's recommendation with the return of all papers. In due course of mail this communication was received by Mr. Shontz. Mr. Shontz testifies that he received a letter from Mr. Slifer, and that he thought there was enclosed with it a copy of a letter written by Mr. Fairman to Mr. Yung or to Mr. Slifer. Having received the letter, Mr. Shontz testifies that he does not remember whether he read the enclosures attached thereto carefully. He said, "I probably skimmed over it and seeing from Mr. Slifer's letter that this was in Panamá, or perhaps dealing with Panamá law, I immediately turned it over to Dr. Galindo." In answer to the question whether he turned over whatever was in it, he replied, "I think so; I think I turned over the whole thing; I would not be sure; I think I turned it over to him. I remember distinctly that Dr. Galindo was sitting on the opposite side of the table when it first came to my attention."

Afterward, on the 17th of February, at the request of Mr. Burat, the Water Commissioner, Mr. George L. Campen, turned off the water on the premises known as lots 621, 623 and 625, Colon, and Dr. Connor, the sanitary officer of Colon, ordered the tenants to vacate the upper floor of the premises for sanitary reasons. The petition charges that the said respondent without replying to his superior, Mr. Shontz, or replying to the letter of Mr. Slifer, or communicating with Mr. Yung, took the matter in his own hands and wrote in Spanish to Mr. Burat to call and see him at Panamá. This letter bears date of February 22, 1908, and as it is important we will set it out in full as it appears in the record:

"PANAMA, February 22, 1908.

"MR. MORIL BURAT, COLON.

"Esteemed Sir: It is very possible that by means of my intervention and mediation the differences pending between you and Dr. Bonis with relation to the lease contract of certain houses

situated in Colon, can be arranged satisfactorily, on the condition that you be reasonable in the matter, however.

"Come to Panamá on next Monday, alone and without the assistance of a lawyer, if you desire that I mediate in the affair referred to. Neither should you communicate to any person whatever in Colon that I am taking part in the arrangements referred to, neither must you make known the object of your visit to Panamá; otherwise everything will fall through.

"Your humble servant,

"(Signed) INOCENCIO GALINDO."

Despite the injunctions of secrecy imposed by the respondent, Mr. Burat consulted with his lawyers and they advised him, as he testifies, to write a polite letter to respondent, but not to attend any conferences. The letter was written in French and bears date of February 23, 1908. Mr. Burat testifies that he wrote it on the advice of his counsel, as they had told him to write a polite and decent letter, and that is what he did. Respondent, on receiving this letter, sent a telegram to Mr. Burat under date of February 24, showing that the letter must doubtless have been received before the telegram was sent. The telegram was in Spanish and the translation by the official interpreter is as follows: "Burat, Colon. Come to-morrow without fail; to your interest." In response to this telegram Mr. Burat consulted Dr. Jolly, his Panamanian counsel. Proceeding to Panamá he had an interview with Dr. Galindo and afterwards with him and Dr. Bonis, with whom he had the contention in regard to the property in Colon, and as a result of said conferences agreed upon that day to settle the controversy between Mr. Burat and Dr. José María Bonis for the sum of $1,500 cash and $2,000 at the rate of $100 a month until the $2,000 is paid; the payment of $2,000 to be secured by Burat.

The explanation given by the respondent of his connection with this matter is that he is legal adviser of the Isthmian Canal Commission; that he always shares an office with Mr. Shontz and that all matters pertaining to land titles with the Panamá Railroad Company were turned over to him for action; that the first he had ever heard of the matter officially was on the 20th of February at his office in the Administration Building at Ancón; that he shared the same office with Mr. Shontz; that Mr. Campen, the water com-

missioner for the Isthmian Canal Commission, called upon him and after having spoken to Mr. Shontz, informed him that Mr. Burat had a suit pending with Dr. Bonis and that Burat, as the lessee of the property, had refused to pay water rates, and the water commissioner had ordered the water to be cut off; that as the house had become unsanitary on account thereof, the tenants would be expelled from the house; that Dr. Bonis and his attorney had protested against this action; that this was the first time the action of the water commissioner came to the knowledge of the respondent; that he was asked whether he was acquainted with Dr. Bonis and Mr. Burat and replied that he was acquainted with both gentlemen; that Mr. Campen, the water commissioner, suggested the idea of having Mr. Bonis and Mr. Burat meet together to see whether they could come to some agreement and relieve the embarrassing situation; that he then offered to address himself to Dr. Bonis and Mr. Burat and to bring them together and see whether they could not come to a settlement of their differences; that he made this offer not in the interest of either of these two gentlemen, but in the interest of the Isthmian Canal Commission, and with the firm belief that he was complying with his duty; that before that time he was never consulted about the matter; that at that time he advised Mr. Campen not to reply to Dr. Gorgas in answer to some inquiry in regard to the matter that Dr. Gorgas had submitted; that Mr. Campen offered to write to Dr. Bonis that the whole affair had been put in the respondent's hands; that on the 21st of February, he received a copy of a communication that Mr. Campen had addressed to Dr. Bonis; that upon the receipt thereof, respondent wrote a letter in Spanish to Mr. Burat inviting him to come to his office; that Bonis blamed the respondent for the action taken by the water commissioner and that when the letter was received from Mr. Burat declining the the interview, Bonis accused respondent of having countermanded the request made him in the letter; that to satisfy Bonis of his good faith he wrote the telegram and gave it to Bonis to transmit to Burat; that in response to the telegram Burat called at his office and tried to discuss the matter with respondent, but that the respondent refused to discuss

the matter with him and told him to find Bonis and come to his office at any time before twelve o'clock or from two to five in the afternoon on that same day; that later in the day Burat and Bonis appeared in the office of the respondent, the date being the 26th of February; that Burat and Bonis discussed their differences; that the only opinion that he gave at any time was as to a proposition made by Burat to Bonis agreeing to pay $100 silver for each of the remaining 36 months of the term of the contract, $3,600 in all, and that he then said to Burat that it was too good a proposition and then said in a low voice to Dr. Bonis that he should accept the offer made by Mr. Burat to Dr. Bonis; that, refusing to accept the offer, he said to him and Mr. Burat that there was no use to continue to discuss the matter and that his inviting them to come to a conference in his office without the assistance of their respective lawyers or attorneys was because he thought their attorneys would make it more difficult for the interested parties to come to a settlement; that in case they came to a provisional agreement they should then consult with their respective attorneys in Colon; that he did not know at the time of the conference that the relator was either adviser or attorney for Mr. Burat or Mrs. Burat; that on the evening of the 26th of February when he returned to his home in Panamá, he received a card from Mr. Bonis; that on the 27th of February after this conference, the relator appeared in the office of Dr. Galindo and inquired for Mr. Shontz, who was absent at the time; that he informed the relator that Mr. Burat and Dr. Bonis had been trying to get a settlement of their differences the day before, but had not come to any agreement. The relator asked the respondent if he had been informed of the request he had addressed to the General Manager of the Panamá Railroad Company in regard to the property in controversy, to which he replied that he had heard nothing about said request. The relator then sat at the desk of Mr. Shontz and took a sheet of paper and wrote the letter which appears in the record. The said letter is addressed to the respondent and contains what appears to be an exact copy of the three propositions made in the conclusion of the letter from Mr. Fairman to Mr. Yung which was subsequently

transmitted to Mr. Slifer, that Mr. Slifer transmitted to Mr. Shontz and which Mr. Shontz said he thought he had handed over to the respondent. The letter of the relator's of the 27th of February he did not send to Mr. Slifer with his recommendation until the 29th of February, when he then wrote to Mr. Slifer that he had received a letter under date of the 27th from the relator, the attorney for Mrs. Burat, which he enclosed. He concluded his letter in the following words: "It is my opinion that the request expressed therein is perfectly in order, and that our Company is not only in a position to accede to it, but should do so." On the 29th of February, he received another visiting card from Dr. Bonis, which did not, however, reach him until after he had written the letter referred to. This visiting card had written on it the information that the controversy between Mr. Burat and Dr. Bonis had been settled. Respondent testifies that all he did in the matter was through a sentiment of duty to the Isthmian Canal Commission; that he did not care but for the interest and prestige of the United States and not for the interest of the private parties.

Having thus taken a general view of the evidence, we will now proceed to a more careful analysis of the same.

The letter from Mr. Slifer to Mr. Shontz, dated February 5, 1908, has a sub-head as follows: "Lease of lots to Mrs. Martha Burat." This letter Mr. Shontz testifies positively that he handed to the respondent. The respondent does not deny having received the letter. He says, "Mr. Shontz has stated that when Mr. Slifer sent him that letter and some enclosures which I—and some enclosures, he handed them to me across the table. That must be true because I have never found Mr. Shontz to have said anything but the truth. But really I did not look for the papers that were handed me across the table and I did not see what the enclosure was, if there were any." It would, therefore, clearly appear from the respondent's own evidence that the letter of Mr. Slifer's in regard to the lease of the lots to Martha Burat was brought to the attention of the respondent. As to the enclosures he denies that he ever saw them. It will be noted, however, that Mr. Shontz thinks that he handed the enclosures to respondent with the letter of Mr. Slifer's. The

respondent testifies that the first he ever knew of the water being shut off from the property was on the 20th day of February, a day on which he said Mr. Campen called. Mr. Campen testifies that on or about the 20th of January, 1908, he received a letter from Mr. Burat which appears in the record.

This letter refers to the lots, mentions the name of Dr. Bonis and of Ceballos and of the trouble between Mr. Burat and Dr. Bonis and makes the request that the quarterly instalments of water rent should be accepted only from Mr. Burat. He declines to pay the water rent himself and asks that the water be shut off. Mr. Campen testifies that on the 29th of January he had a conference with the relator at his Colon office, as appears from a note on the above letter. He further testifies that after consulting with Dr. Galindo and the legal department in regard to accepting water rents on these lots, that when the time had expired had the water shut off on the 17th of February; that his conference with Dr. Galindo in regard to this matter took place before that time. The respondent asked Mr. Campen if a letter of February 21, addressed to Dr. Bonis, was not the first communication in regard to this matter between Mr. Campen and respondent. Mr. Campen replied "I think it was previous to that time; I think it was a few days previous to the cutting off of the water." Mr. Campen further testifies that there was a conference in Mr. Shontz's office between Mr. Shontz, Dr. Galindo and himself, in which he laid the matter before them "to see if there could be some way of getting the matter settled for the parties in interest, the man himself and attorney and client;" that Dr. Galindo then stated that "shutting off the water was the proper course." Being asked by Dr. Galindo whether the respondent had not told Mr. Campen subsequently that he had addressed himself to Mr. Burat and Dr. Bonis to have them come to a settlement, Mr. Campen replied that he did not believe he was so told; he didn't remember it. On cross-examination Mr. Campen locates the time of the interview between Mr. Shontz, Dr. Galindo and himself as some time between the 28th of January and the 15th of February and it was after he had had the interview with Mr. Fairman. It was the

22d of February that Dr. Galindo wrote a letter to Mr. Burat. The letter itself is a remarkably strange letter for a disinterested person to write. It is a letter that never should have been written, if Dr. Galindo knew that Mr. Slifer had asked for advice with regard to this property. We are bound to believe that Dr. Galindo did know that fact and, therefore, was guilty of gross impropriety in taking up the matter without the authorization of his principal, which was not Mr. Campen or Mr. Shontz, but was the General Manager of the Panamá Railroad Company in whose service, if anybody's, the respondent was acting. Another very noticeable thing is that this letter was not written in the regular course of business of the respondent's office. No copy was kept and there is nothing to show that the respondent found it necessary to write to Dr. Bonis. It would seem as if Dr. Bonis was fully advised and it would appear from the respondent's own evidence that Dr. Bonis knew of a letter being sent to Mr. Burat and had accused the respondent of having countermanded the request made in the letter. The letter was written in Spanish at the home of the respondent. The letter breathes intrigue and conspiracy. He is willing to intervene and mediate the difference pending between Mr. Burat and Dr. Bonis on the condition that Mr. Burat should be reasonable in the matter. Dr. Galindo has testified that he never examined, up to this time, into the equities as existing between Mr. Burat and Dr. Bonis, and yet in his first communication offering his services for the purpose of adjusting the differences, he imposes a condition on Mr. Burat that he must be reasonable in the matter. He continues, "Come to Panamá on next Monday alone and without the assistance of a lawyer if you desire that I mediate in the affair referred to." This is condition number 2. He must be reasonable and he must come alone and without the assistance of a lawyer. The letter continues: "Neither should you communicate to any person whatever in Colon that I am taking part in the arrangements referred to." This is condition number 3, imposed by the intervener and mediator upon Burat. And why if the purpose of the writer of that letter was to mediate properly, should the condition be made that nobody in Colon should know that

he was taking part in bringing about a proper, just and equitable adjustment of their differences? The letter continues: "Neither must you make known the object of your visit to Panamá." Condition number 4. Why this secrecy? Then follow the words: "Otherwise everything will fall through." He does not say that he would refuse to mediate; he does not say that he could be of no service, but he said that "everything will fall through." This letter seemed to have been written with the deliberate purpose of arousing in the mind of the man to whom it was addressed, apprehension, and compel him by reason of the statements therein made and the position occupied by the writer of the letter to put himself in the hands of the respondent. Mr. Burat declining an interview, the telegram was sent, "Come tomorrow without fail; to your interest." It appears from the evidence of the respondent that Dr. Bonis was reproaching him for not bringing about a conference with Mr. Burat. If Dr. Bonis expected that the respondent was to be a fair and impartial mediator between him and Mr. Burat, why should any cause for complaint exist? Therefore it stands out as a fact that Dr. Bonis was urging Dr. Galindo to compel Mr. Burat to a mediation; that Mr. Burat had declined and with full knowledge of all this the above telegram was sent, which is in the nature of a command. At least it had that effect upon the person to whom it was addressed and upon his Panamanian attorney to whom it was shown, and he was advised by his counsel to go and put himself in the hands of the respondent. It stands uncontradicted that in the interview between Dr. Galindo and Mr. Burat a pressure was brought to bear upon Mr. Burat. He was told that he had better settle his affair, to which Mr. Burat replied that if he could arrive at a settlement, he was well willing. He was asked what he offered. He said he offered $1,000. Then he was asked as to the rental value of the property by the month and by the year. The respondent told him that he could not do anything unless he brought Dr. Bonis there and that he should go and get Dr. Bonis. The interview was described by Mr. Burat as consisting of a conversation between Dr. Galindo and Mr. Burat in French, and between Dr. Galindo and Dr. Bonis in Spanish, both of which languages Mr. Burat

understood, but he testifies that when Dr. Galindo spoke to Dr. Bonis he spoke so low that he could not hear what he said. Mr. Burat testifies, in his English, that he was "exasperated because there was too much; I was tired with all these things; it was too much, I don't know what it is—at least to have a little tranquillity in my brain and turn back again." Mr. Burat, without counsel, unaided and alone, had by letters, telegram, and words of mouth, apparently reached a condition where he was not in a good frame of mind for the transaction of business. Of his interview at Dr. Galindo's office, at which Dr. Bonis was present, he must have felt at least that a pressure was being exerted upon him. He said in his broken English, "at that time I was so much exasperated I cry so much and I grind my hands so; I grind the hand so much I cry, because he say (referring to Dr. Galindo) I don't understand," and he said "he neither do anything because I am too financial, a word I don't understand, so they abandon me, and he tell me that unless—so I say to Señor Galindo if I could settle my business with Dr. Bonis I could do it, if Bonis want to go he will come here to him, and I say we could not settle again because I could not pay such a price; it is more than I would be able to do, so that I left the place without any settlement whatever."

As a result of this conference a settlement was effected on the day of their conference. On the following day Mr. Fairman called at the office of the respondent and was informed by him without question that Mr. Burat and Dr. Bonis had been in the day before, but had been unable to effect a settlement; that the respondent was not aware that the relator represented Mr. Burat, or aware of the communication that the relator had made to the Panamá Railroad Company; therefore the letter of February 27th was written by the relator. Two days later the respondent approves of the offer of Mr. Burat through his attorney, but it must have been that, at the time that the respondent wrote that letter, he had full knowledge that the whole controversy had been settled. Not a copy of the letter to Burat, neither the cards from Dr. Bonis, that were subsequently offered in evidence, were permitted by the respondent to become a part of the files in his office, but were kept at his home and the

cards were never placed upon the records of the office until after these proceedings were instituted.

Therefore we find: *First*—That Dr. Galindo received the letter of Mr. Slifer to Mr. Shontz, bearing date February 5, 1908, in regard to the Burat lots in Colon.

Second—That in all probability he received the two enclosures. If he did not, he, being apprised that there should have been such, failed in his duty to secure copies of the same.

Third—That he was consulted by Mr. Campen before the water was shut off the Burats' lots, February 17, 1908, and must in that interview have learned many of the things he now claims he ascertained later.

Fourth—That he had no right as a lawyer to intervene or mediate between Burat and Bonis in the manner he did, if at all; because his first duty was to answer the letter of Mr. Slifer to Mr. Shontz, and for the further reason that it was unprofessional for him to open or conduct negotiations with the client of another lawyer, be he either Jolly or Fairman, and his letter and his evidence show conclusively that he knew that Jolly was Mr. Burat's lawyer.

Fifth—That his letter and telegram to Burat were mandatory and showed that he had already taken sides in the controversy.

Sixth—If this had not been so, he would have dropped the matter when Burat so politely declined his services and, having done his full duty as a disinterested friend or acquaintance, would not have written the telegram which he afterwards gave Bonis.

Seventh—That in writing and telegraphing from his home; delivering the messages to Bonis and not keeping office copies of the same, the inference is justifiable that he was not acting as the legal adviser of the Isthmian Canal Commission or Panamá Railroad Company.

Eighth—That the material allegation of the petition have been sustained by the proof.

It is ordered that the said Inocencio Galindo be suspended from the practice of law in the Courts of the Canal Zone for the period of one month.

The CHIEF JUSTICE concurred. JUSTICE GUDGER dissented.

GUDGER, J. Proceedings of disbarment were begun against the respondent, Dr. Inocencio Galindo, on the 16th day of April, 1908. The proof was given in open court and from the evidence adduced the following facts are established:

Messrs. Burat and Bonis had a dispute in regard to certain property located on the land of the Panamá Railroad Company in the city of Colon, which had been leased by Burat from said company and upon which he had erected three houses for rental purposes.

During the summer of 1907, Burat went to Costa Rica and left in charge of his property one Ceballos as agent, giving him full power of attorney, properly executed and duly recorded, to rent or lease the same at his discretion. When he returned from his trip he found that his agent had leased to Bonis said houses for the term of four year at $250, gold, per month. Burat commenced proceedings in the court at Colon to cancel said lease on the ground of fraud, and for some reason the same was dismissed and shortly thereafter another action of a like character was instituted in the same court and was pending at the time the agreement, hereinafter referred to, was made. Mr. Burat employed Mr. Jolly as his attorney of record. Mr. C. P. Fairman subsequently represented Burat, but not as his attorney of record.

Mr. Fairman wrote a letter to Mr. Yung, land agent of the Panamá Railroad Company, setting forth the grievance of Burat and asking the kindly offices of that corporation to the end that they would not receive the ground-rents from Bonis or any other person except Burat and indicating that he (Burat) would not pay the same, so as to give cause for the company to cancel the original lease. He also offered, as Burat's attorney, to bring suit in the proper court to effect this cancellation and agreed that the Panamá Railroad Company could then treat with his client, after he had accomplished his purpose of cancellation. In this letter he declared that Bonis had rented this property from the agent of Burat at the price of $250, gold, per month, while, in truth and in fact, the property was worth $1,000, gold, per month. This letter is made a part of the complaint. Mr. Yung forwarded this letter to Mr. Slifer, General Manager of the Panamá Railroad Company, which was in turn

forwarded to Mr. Shontz, the regular attorney for the company on the Isthmus. In the meantime Mr. Fairman had succeeded in getting the Water Commissioner, Mr. Campen, to cut off the water from the premises and the sanitary authorities to take action looking to the dispossession of the renters. Up to this time, the respondent, Dr. Galindo, had no connection whatever with the matter.

Nothing further was done for two or three days, until about the 20th of February last, when the Water Commissioner, Mr. Campen, went to the office of Mr. Shontz, Dr. Galindo being present, where they all had a full discussion touching the question of cutting off the water from the houses above referred to and the duty of the Isthmian Canal Commission and the Panamá Railroad Company in the premises. It was finally agreed between Messrs. Shontz and Campen that, as the Isthmian Canal Commission and the Panamá Railroad Company were greatly embarrassed in regard to the matter, it would be best to see if the parties could get together and make an arrangement which would be satisfactory. Dr. Galindo was asked by Mr. Campen if he knew the parties and, on stating that he did, was requested to see them and see if they could arrive at a satisfactory settlement. This course was taken for the reason that Burat had called upon the Isthmian Canal Commission and the Panamá Railroad Company to aid him in the matter and it was thought that the parties, if gotten together, could see their way to a settlement of their differences. On the 22d of the same month, Dr. Galindo wrote a letter to Burat asking him to come to Panamá; and to come alone; and not to bring an attorney with him and to say nothing about his business in Panamá. The doctor explains that he was commissioned only to see the parties and see if they could not of their own accord come to some agreement and that he felt if they brought their attorneys, Mr. Jolly and Mr. Rodriguez, an agreement would be unlikely. He also states that, at the time, he had no knowledge that Mr. Fairman, the complaining witness, was in any way connected with Burat as his attorney. Burat failed to come at the date set forth in the letter and Dr. Galindo sent him a telegram asking him to come to Ancon and stating in said telegram that it was

to his (Burat's) interest that he should do so. Burat submitted this telegram to his attorney, Mr. Jolly, who, knowing the purposes in view, advised his client to go as requested. Following the advice of his counsel, Burat came to Ancon and called on Dr. Galindo at his office in the Administration Building. Prior to this, Mr. Campen had written a letter to Bonis advising him that the controversy between himself and Burat had been referred to Dr. Galindo. Dr. Galindo asked Burat a few questions relative to the rent he was receiving and the amount he was losing through the Bonis contract and then suggested to him that it would be wise for him to see Bonis and see if the matter could be adjusted between them. At this interview, Burat described his condition, saying that he was greatly troubled, wanted the matter settled in some way, and alleging that he had been badly treated. This bad treatment alleged by Burat was the conduct of his agent and Bonis and in no way referred to the respondent. Dr. Galindo then told Burat that he could do nothing unless the parties would get together. Burat left the office; went down to the city of Panamá; saw Bonis and brought him up to Dr. Galindo's office; and, in the presence of Dr. Galindo, Burat and Bonis had a consultation in regard to their differences. While they were together, Dr. Galindo advised them that they could make a preliminary agreement with regard to their controversy and submit the same to their attorneys for approval or disapproval. He repeated this, once or twice, to them. The parties, however, left the office without arriving at any conclusion, as the testimony of Burat, Bonis and Dr. Galindo positively establishes. It was also shown by Bonis, Burat and Dr. Galindo that Dr. Galindo made no statement of any terms upon which they should agree; nor did he name or discuss any amount that either the one or the other should pay. Subsequent to this time, Dr. Galindo had nothing more to do with the case and did not know of the settlement until several days after its consummation.

Burat and Bonis, after leaving Dr. Galindo's office, went to the Plaza Santa Ana, where for about one hour they discussed the matter. They then separated; met again some hours later and went together to the Panamá Railroad

depot, still discussing their troubles. Burat and Bonis boarded a train, leaving Panamá for Colon, and when out about Corozal they came to an agreement, which they reduced to writing, but did not sign. The agreement was that Bonis was to give up his lease for four years to the property; the suit in the Panamanian court was to be withdrawn and Burat was to pay to Bonis the sum of $1,750, gold. Bonis returned to Panamá that same afternoon and on the next day or the day following went to Colon; saw Burat, and the two together went to the office of Mr. Jolly, Burat's attorney, and submitted their agreement to him, which he approved. They then went to the court in which the action was pending; had the same dismissed and all papers necessary to the carrying out of their agreement written up and signed. The property was turned over to Burat and the amount due Bonis, by virtue of the agreement, secured.

It is claimed that Burat was swindled by his agent Ceballos in leasing this property for $250, gold, per month, when the same was worth $1,000, gold, per month. The answer is, Dr. Galindo had no connection with that transaction and was in no way responsible for what occurred. When he undertook, at the request of Messrs. Shontz and Campen and as a pure act of friendship to both Burat and Bonis, to mediate between the two last named he found that Burat was losing, according to his (Burat's) own view of the case, $750, gold, net, per month; and, furthermore, that the water supply had been cut off; the tenants were being dispossessed and it appeared that his loss would be even greater than that. In addition to this there was litigation in front of both parties which was likely to last for years, in which event even the gainer would be the loser. It would seem even if the respondent had advised, which he did not do, that the parties make an agreement by which the sum of $1,750, gold, should be paid as a compromise of all their differences, Burat would receive back his property in good shape, it would have been nothing more than a conservative man, acting honestly as a mutual friend to both parties, would have done.

It will be borne in mind that the respondent was requested

to see these parties and see if they could agree and that he did this and nothing more. There is no evidence of any character whatsoever that Dr. Galindo received a single cent for his services, or that he demanded any amount; in fact, the prosecuting officer, Mr. Brown, announced to the court that there was no claim of anything of that kind reflecting on the respondent or any one else. Nor is there in the entire record, from my view of the case, a scintilla of evidence that he misrepresented anything to either of the parties or that he was guilty of any fraud or misconduct.

By this agreement Bonis was to give up his contract of rental for the four years' term and deliver the property over to Burat and Burat was to pay him the amount above set forth. The amount that Bonis would have received, according to the contract, over and above what he had agreed to pay as rent, being $750, gold, per month, would have been $9,000 per year, or the sum of $36,000, gold, for the term of the lease he had made with the agent of Burat. This was cancelled by the agreement made by the parties and surely there is not a lawyer practicing within the limits of the Canal Zone that would not have considered, under the circumstances, that Burat made the best that could have been made of the bad bargain his agent got him into.

So far as the record shows, the conduct of respondent in this matter stands uncriticized and unquestioned, not only by Burat and Bonis, but also by the Isthmian Canal Commission, the Panamá Railroad Company and, likewise, by Messrs. Jolly and Rodriguez, the attorneys for Burat and Bonis.

I have called to the attention of my associates in the court the fact that the complaint fails to allege that the respondent is an attorney; that he has ever practiced law or that he has ever been admitted to practice by the Supreme Court or other courts within the Canal Zone. There is no proof showing that he has ever been admitted to practice or that he has ever practiced or in any way exercised the office of a lawyer within the jurisdiction of this court. Such being the case, a serious question arises as to whether or not the case should not be dismissed for that reason.

For the reasons herein, I file this my dissenting opinion

from the order of the court made suspending the respondent from the practice of law within the Canal Zone for one month.

MELENDEZ *versus* UNION OIL CO.

No. 34. Argued March 23, 1908.—Decided May 23, 1908.

EXEMPLARY DAMAGES. TRESPASS. PIPE LINE.

Defendant constructed a pipe line across property of plaintiff without permission from plantiff. Lower court held this to be trespass and appointed experts to assess damage, instructing them to allow exemplary damages. HELD to be error. To justify a judgment for exemplary damages, where same can be obtained, fraud, malice or gross negligence must be alleged and proved. But the Civil Code makes no provision for exemplary damages, allowing only ten per cent in addition to actual damage, in the analogous case of an aqueduct.

REAL PROPERTY. POSSESSION TRANSFERRED, TITLE RETAINED

A deed that does not convey the title cannot convey the possession alone. An attempt to do so results in the grant of a voluntary servitude.

SAME. SERVITUDE.

A servitude can be conveyed or enlarged by the grantee only with the consent of the grantor and by paying him for the additional servitude.

Appeal by defendant from the Circuit Court of the Third Judicial Circuit; Hon. Lorin C. Collins, Judge.

THE facts appear in the opinion.

G. M. Shontz, for appellant. *Oscar Terán*, for respondent.

H. A. GUDGER, J. This action was began against R. W. Fenn, agent, on the 12th day of May, 1906, for the purpose of obtaining an injunction against him for attempting to construct a pipe line across land which the plaintiff claims. The court having heard the evidence refused to grant the injunction, but allowed the plaintiff to amend his complaint so as to make the Panamá Railroad Company and the Union Oil Company of California parties defendant, and permitted the filing of a new complaint declaring for damages against the two companies for the wrong complained of. In this complaint, it is stated that the Union Oil Com-

pany "has trespassed upon the plaintiff's property above described without permission." In the prayer the plaintiff asks "that the Union Oil Company be condemned to pay the plaintiff the sum of $10,000, United States currency, as a redress for the wrongs and damages caused to the plaintiff in the property above described." The defendant answering makes general denial, and sets out specially as a defense the fact that the Union Oil Company has a grant from the United States Government authorizing them to construct an oil pipe-line across the Isthmus from La Boca to Cristobal, and a permit from the Panamá Railroad Company to the use and occupation of any of their lands for this purpose.

Evidence was taken by both parties and the court, after considering the same, found the equities as to the Panamá Railroad Company in favor of that company, but as to the Union Oil Company the court found that it was guilty of a trespass. On motion of plaintiff's attorney, and objected to by defendant, three experts were appointed and were instructed to make an ocular inspection of the property and report their findings to the court. These experts made different findings and were discharged by the court against the will of the defendant company, and a new set of experts, against the protest of defendant company, was selected. The court charged them, among other things, as follows:

"The said experts are further instructed that the court has in this case found the defendant guilty of a trespass upon the reversionary right of the complainant to the right of way now used by the Panamá Railroad Company, and therefore they may allow, should they see fit, to the complainant such exemplary damages for said trespass as may to them seem just and right.

"That by exemplary damages are meant such damages as will compensate the plaintiff for the wrong done to him, and to punish the defendant, and to furnish an example to deter others from like practice when a trespass was malicious and wilful, oppressive or wantonly reckless. Such damages not, however, being those which naturally flow from and are the immediate result of the act complained of, except as hereinbefore provided."

The experts made the following report: Expert Ayres allowed, as actual damages, $350, and Prescott and Hyatt the sum of $1,000 actual damages, and in addition thereto the sum of $2,500 exemplary or punitive damages. The

court accepted the report made by Messrs. Prescott and Hyatt and gave judgment in accordance therewith against the Union Oil Company for the sum of $3,500, United States gold; from which judgment the defendant appealed.

The question of exemplary damages and its application to this case must be considered. Bouvier in his Law Dictionary defines it to be "those damages allowed as punishment for torts committed with fraud, actual malice or deliberate violence or oppression." This allowance is termed "smart money" or "exemplary," "vindictive" or "punitive" damages. The question arises naturally as to whether or no the instructions given by His Honor meet with the requirements of law laid down as a substratum of such doctrine. In the first place, there seems to have been no evidence before the court, and certainly none before the experts, so far as the record discloses, that there was either fraud, actual malice or deliberate violence or oppression. There is no allegation in the complaint of either malice or fraud or anything which would bring this case within the radius of the doctrine of punitive damages. The complaint asks that the Union Oil Company be condemned to pay to the plaintiff the sum of $10,000 as a redress for the wrongs and damages caused to the plaintiff. There is not one word in the complaint that would show or even have a tendency to show that such a thing as fraud or malice was charged.

In the Cyclopedia of Law and Procedure, we find, beginning on page 179, Vol. 13, the following:

"While the rules of good pleading require that the facts which constitute special damage, where the plaintiff has sustained personal injuries, shall be stated specifically, it is neither necessary or proper to set forth the evidence on which the pleader relies."

In Connor *v.* Ewell, 90 Texas, 275, we have the following:

"An allegation in the complaint, stating that a trespass was committed forcibly and unlawfully, is insufficient to sustain a complaint for exemplary damages."

And again in Hooks *v.* Fitzenreiter, 76 Texas:

"Where exemplary damages are sought for the breach of a contract the facts should be stated attending the breach so that it can be ascertained from the pleadings whether they constitute

malice and fraud and whether circumstances connected with the breach amount to tort, and the allegation that the defendant broke the contract wilfully, fraudulently and with malice, is not of itself sufficient."

In Cameron v. Bryan, 89 Iowa, 214, it is held that exemplary damages cannot be recovered by a tenant for his wrongful dispossession of the leased premises, or in an action for personal injuries unless malice is alleged. There is a long line of decisions sustaining this view. Indeed, it is the only reasonable view that can be taken of the subject.

It is not denied that the Union Oil Company laid the pipeline complained of, on the right of way of the Panamá Railroad Company, and did this with the knowledge, consent, and at the instance of that company. This was found by the court and not objected to by either party. There is, again, no question but what defendant company had a charter to lay their pipe-line from La Boca to Cristobal and that their intention in so doing was to furnish oil to the Panamá Railroad Company and the Isthmian Canal Commission, and, in addition, do a commercial business, and that their work on the pipe-line was done in good faith.

To justify punitive damages there must be: First, malice, wantonness or oppression; second, fraud; or third, gross negligence or recklessness before punitive or exemplary damages can be considered. In Vol. 13, of the Cyclopedia of Law and Procedure on page 108, we find the following:

"Unless there is some element of malice or gross negligence, or circumstances of aggravation, the measure of damages is the measure of compensation for loss sustained, and nothing more."

And on page 109:

"And an instruction as to punitive damages, when there is no substantial evidence that the neglect so complained of was wanton or malicious, has been held to be erroneous."

Sutherland on Damages, in Vol. 2, says:

"These damages are allowed only when there is misconduct and malice or what is equivalent thereto. A tort committed by mistake in the assertation of a supposed right or without any actual wrong intention or without such recklessness or negligence as to evidence malice or conscious disregard of the rights of others,

will not warrant the giving of damages for punishment even when the doctrine on such damages prevails."

This same writer also states that there can be no damages given unless the trespass is wilfully and maliciously done and there is connected with the breaking and entering circumstances of outrage, insult or wanton destruction of personal property.

We have discussed this question from the standpoint that the doctrine might be applicable in the Canal Zone, but the question is whether or not this be true, and this depends on two questions: First, whether there is any common law in the Canal Zone that justifies its application; or second, whether there is any statute giving it force. For one hundred years and more the territory of which the Canal Zone strip forms a part has been governed by the Napoleonic Code, and such a thing as common law entirely unknown.

There exists at present within this jurisdiction the laws of Panamá which existed on the 26th day of February, 1904, not modified or repealed, and in addition thereto laws which have been enacted since that date. Neither in the Panamá Code nor any amendments thereto, nor any laws which have been enacted for the Canal Zone since, is there any mention of the doctrine of exemplary or punitive damages. By examination of the Civil Code of Panamá, Art. 923, it will be found that provisions are made for aqueducts, and the section, in full, reads:

"The owner of a servient tenement shall be entitled to payment for the value of all the land occupied by the aqueduct, in addition to that of a strip on each side thereof not less than a meter wide along the entire course, which strip may be greater by agreement between the parties or by order of the judge when circumstances shall so require; and an additional ten per centum of the entire sum."

This section seems to be broad enough to include a pipe-line such as is set forth in the complaint in this action. Therefore it must follow that no more than the actual damages and ten per centum added can be collected. It is an admitted fact that the pipe-line was laid on the right of way of the Panamá Railroad Company, and is, therefore, an additional servitude for which the defendant in this case

would be responsible for any loss by virtue of the same resulting to the true owner of the property. This damage would be measured by the increased loss resulting to the owner by virtue of this additional servitude caused by the defendant. As the instruction of the court on the question of exemplary damages may have had a tendency to increase the amount awarded as actual damages, I think it a proper case to be referred back for a new trial.

There are other questions raised in the record but as the one above referred to settles the entire case, so far as this court is concerned, it is not considered necessary to pass upon them.

It is my opinion that an order should be entered reversing the judgment of the Third Judicial Circuit and granting a new trial.

F. MUTIS DURÁN, C. J. I concur with Justice Gudger for the following reasons in addition to those he has given:

From duly recorded deed No. 20, executed in the city of Colon on February 11, 1891, and offered by the appellant in this suit, defendant in the court below, to prove his title of ownership to the land which the defendant is claimed to be occupying, it appears that Samuel D. Gonzalez P. sold to Porfirio Melendez one-half of certain lands known as "Peñas Blancas Abajo," situated in what is to-day the Canal Zone; Gonzalez having purchased the said property at a public auction sale on July 16, 1889, held in accordance with a judicial order issued in the succession proceedings of the deceased Matias Villaverde, as is shown by the duly recorded minutes of that sale, in which the boundaries of the property are described as follows: By the north those lands called Vamos Vamos; inclining to the right and down the stream to the mouth called Aguas Prietas; to the south, the land belonging to Mrs. Manuela Medina, beginning with a point where existed a tree called "Bongo," which does not now exist; to the east, the mountain; and to the west the same mountain, uncultivated.

The minutes of the auction sale then go on to state: The judge also ordered that the public should be notified of the fact that 100 hectares of land sold by the owner of the

above described tract to the Universal Interoceanic Company, are not comprised in the present sale and are excepted therefrom, which land is described as follows: To the north, the River Chagres and the land Peñas Blancas Abajo, which has already been described; to the east, the lands of Peñas Blancas en Medio; to the west, the lands of Ahorca Lagarto; and to the south, to the mountain.

Continuing, these minutes further state: The lands that were the property of the aforementioned Estefana Villaverde and of the estate of Matias Villaverde, one-half of which have been hereby granted to Samuel D. Gonzalez P., are the following in limits: To the north, the land Vamos Vamos, inclining to the right and down the stream to the mouth called Aguas Prietas; to the south, the land belonging to Mrs. Manuela Medina, beginning with a point where existed a tree called "Bongo," which does not now exist; to the east, to the mountain; and to the west, the same mountain, with an extension of two leagues on each side of the river and within the limits already described.

It will be seen from this deed, above referred to, that what Melendez bought from Gonzalez was only one-half of the lands mentioned therein; that the other half belonged to Estefana Villaverde and to the estate of Matias Villaverde; Melendez thus appearing as possessor pro indiviso, or in common with other persons, who do not appear as parties in this suit; also, that in the first part of the minutes of the auction sale referred to, the boundaries on the east and west are stated as running to the mountains, and that in the final part of the minutes the phrase "having an extent of two leagues' depth on each side of the river" is added.

The defendant has challenged the validity of this document, claiming that the auction sale was a fictitious one, as it was not published in the official record as required by law. No proofs, however, have been offered to substantiate this allegation.

Among the proofs offered by the defendant, without any objection thereto on part of plaintiff, there appears a map, said to have been taken from official maps, of the lands lying between the Juan Gallegos river and the Agua Salud ravine, described by the same boundaries as those set

forth in the old title before mentioned, within which boundaries are comprised the lands of "Peñas Blancas Abajo," bounded on the north by the lands Vamos Vamos, on the south by those of "Peñas Blancas en Medio," and on the east and west by lot No. 3 belonging to the Railroad Company, the former (Peñas Blancas Abajo) extending about half a league on each side of the Chagres River. This map coincides, as regards the boundaries and measurements set forth therein, with the official map referred to in the exhibits of the defendant, which map was prepared in accordance with the Law of October 26, 1861, passed by the former State of Panamá; both the map and the law being alluded to by defendant in this case. The said map was made a part of the law, and to be held as authentic and as a standard in everything pertaining to the boundaries of the land shown thereon. Art. 5 of said Law. In accordance with this law, the Railroad Company was given possession of the tracts of public land to which its contract with the Government entitled it.

According to this documentary evidence, the lands said to be occupied by the defendant being on the line of the railroad and this line itself being within the limits ascribed to the "Peñas Blancas Abajo" lands by the map presented by the defendant, there is no doubt that the plaintiff, by presenting a duly recorded title to them, has proven that he is in legal possession of the land described on said map. This being the case, the land is therefore not of that owned by the Government of the United States or by the Railroad Company, which is referred to in the revocable licenses granted to the defendant company, and which revocable licenses are offered in evidence in this suit.

Among the documents offered by the plaintiff, there also figures a contract dated November 24, 1897, by virtue of which Melendez ceded to the Railroad Company, for such time as the franchise which it held from the Government of Colombia might run, the possession, among other things, of such strip of the "Peñas Blancas Abajo" lands as might be required for its double track, station houses, rolling stock, telegraph and telephone posts, or for any purpose appertaining to and connected with the operation of the railroad com-

pany solely. By this contract there was granted to the company in addition the right to use what stone and wood from the forests that might be necessary, and the former concessions, made to the Company by the preceding owners of the lands referred to, were confirmed.

It appears from this contract that Melendez granted to the Railroad Company the possession of the land necessary for its double track, without, however, ceding or transferring the title thereto. But since under the Civil Code (Arts. 786 and 775) contracts of this nature that do not convey the title cannot convey the possession alone, it is to be understood that the intention of the contracting parties, as shown by the context of the contract, was simply to grant to the Company a right of way or transit for rails, or better said, an easement or voluntary servitude, subject to the provisions of the Code (Art. 937). This servitude cannot be granted or extended by the Company to any other person or company, without previous permission of the owner of the land, and by paying to him whatever compensation or indemnization he might be entitled to according to law, for the additional service or servitude that is intended.

Now then, since in the judgment appealed from, the provisions of the Civil Code, referring to cases of this character, have not been applied, and since it does not appear that the indemnization for damages granted to the plaintiff has been limited to an amount corresponding to the use of only one-half of the land occupied by the defendant, which is the only part to which the plaintiff has proved himself to have a right by registered title, the Court believes that there is sufficient ground to grant the defendant's petition for a new trial. In view of the foregoing, therefore, let a new trial be granted in this cause.

Reversed and remanded.

MADURO-LUPI CO. *versus* KEE CHONG CHANG *et al.*

No. 38. Argued April 22, 1908.—Decided June 16, 1908.

ATTACHMENT.

An attachment is dissolved by subsequent bankruptcy proceedings.

BANKRUPTCY. CESSION OF PROPERTY.

Upon a voluntary cession being made by a bankrupt, all cases pending against him must be consolidated. To give judgment to an attachment creditor after the cession is error.

Appeal by defendant from judgment of the Circuit Court of the Second Judicial Circuit; Hon. H. A. Gudger, Judge.

THE facts appear in the opinion.

Oscar Terán, for appellant. *T. C. Hinckley*, for respondent.

LORIN C. COLLINS, J. It appears from an examination of the record in this case that a complaint and affidavit asking for a writ of attachment were filed in the Second Judicial Circuit on the 19th day of October, 1907; a writ of attachment was issued and the property of the defendants taken in attachment.

On the 29th of October, 1907, Primitivo Tac *et al.*, merchants, and defendants in this cause, filed in the Circuit Court of the Second Judicial Circuit a voluntary cession of property, which was in conformity with the requirements of Art. 1129 of the Code of Civil Procedure of Panamá, page 221. While the record shows that this paper was filed as an answer, it is not entitled in the case and must be regarded as an entirely independent proceeding. It was, nevertheless, a perfect answer to the attachment proceedings.

On the filing of this cession of property, the property of the defendants should have been declared subject to bankruptcy proceedings and measures taken pursuant to Art. 1132, pages 221–222. Art. 786, paragraph 3, page 117, and 1203 and 1204, page 234, of the Code supra, provide that all pending suits against the defendants must be con-

solidated with the universal insolvency proceeding, if the defendants or any of the creditors should so request.

The judgment in the case was entered on the 5th of November subsequent to the filing of the voluntary cession of property. The court had no jurisdiction to enter said judgment without first consolidating the cases as provided by the articles aforesaid.

Arts. 1126, 1132 and 1136 of the Code of Civil Procedure, point out the duty of the judge upon the institution of bankruptcy proceedings against the property of a defendant by the voluntary assignment thereof and the effect of the bankruptcy proceedings on the attachment is the dissolution of same, Art. 1053, 13, page 195. Syndics should have been appointed to take possession of the property and everything should have been conducted in the manner provided by the Code for general bankruptcy proceedings.

For the aforesaid reasons this case in reversed and remanded with directions to proceed in conformity with this opinion.

The CHIEF JUSTICE concurred.

Reversed and remanded.

JANEL *versus* ANDRADE.

No. 40. Submitted April 28, 1908.—Decided June 16, 1908.

PROMISSORY NOTE. SURRENDER OF NOTE.

Appellant claimed that, upon the partial failure of the consideration of his note for $1,250, the respondent agreed to reduce the note $250. It is held that the failure of the appellant to demand the surrender of the note, upon making a payment of $1,000 after maturity, raises the presumption that no such agreement was made.

Appeal by defendant from the Circuit Court of the Second Judicial Circuit of the Canal Zone; Hon. H. A. Gudger, Judge.

THE facts appear in the opinion.

Oscar Terán, for appellant. *W. H. Carrington*, for respondent.

LORIN C. COLLINS, J. The appellee in this case, plaintiff below, brought suit in the Second Judicial Circuit on August 27, 1907, against the appellant, defendant below, for the recovery of $250, United States currency, the balance due on a promissory note for $1,250, United States currency, signed and executed by the defendant in Gorgona on the 25th of September, 1906, payable 90 days after date to the order of the appellee. The appellant filed a general denial to the petition, and for a further plea, a counterclaim for damages in the sum of $1,000, Panamanian silver; alleging that, on the 25th day of September aforesaid, the plaintiff and defendant entered into an agreement in writing under their hands for the purchase and delivery of all the property which the plaintiff owned in Bas Obispo. The contract covered all of the machinery and things in the establishment of the plaintiff for distilling rum at Bas Obispo, consisting of two stills, pumps and empty barrels, and steam boiler and wooden house with its iron roofing, for the sum of $1,250, United States currency. Other things too numerous to mention, belonging to the distillery, were included in the bill of sale. This bill of sale was signed by the plaintiff, who failed to deliver to the defendant the most valuable part of

said enumerated articles. The nondelivery of said articles, which are specified in the answer, was to the damage of the defendant in the sum of $1,000 Panamanian silver.

On the trial the court found the issues for the plaintiff and rendered judgment against the defendant for $250, United States currency, and costs of suit. A motion for a new trial was made and overruled and the cause comes to this Court on appeal.

On the argument of the case in this court, both parties agree in their briefs that the points submitted to the decision of the court were all set out in the said briefs. The appellant contending, (1) that there was a failure on the part of the plaintiff to deliver in full what the contract recited; and (2) that there was a subsequent agreement between the plaintiff and defendant to reduce the purchase price in the sum of $250, United States currency, in order to make up the failure to deliver the articles mentioned in the contract. The appellee's counsel accepted the issues as submitted by the appellant and it is upon these issues that the Court decides the case.

It appears from the evidence of the appellant that, after the execution of the contract, he was informed, or discovered, that a portion of the house and some of the property enumerated in the contract had been removed and that he could not obtain the same; that upon the ascertainment of said fact he called upon the appellee and entered into an agreement that the amount of the consideration should be reduced by the sum of $250, United States currency, on account of the failure of consideration above mentioned. This subsequent agreement is positively denied by the appellee. It appears from the evidence that, although the note would have matured in December, no payment was made thereon by the appellant until in January when, in the store of Pascal Canavaggio at Colon, Mr. Andrade paid on the note the sum of $1,000 gold. It does not appear from the evidence that any demand was made by the appellant for the surrender of the note or that anything was said of the time in which the $250 due by the terms of the note should be paid. The evidence is conflicting as between Andrade and Janel as to the subsequent agreement to reduce the

amount due on the note, $250 gold. The fact that the appellant paid $1,000 on the note after maturity, and did not demand the surrender of the note, which, according to his evidence, would have been fully paid, justifies the presumption that there was no agreement to reduce the amount due upon the note. It seems incredible that a man paying the full amount due by him upon a promissory note should not then and there demand the note itself. If it was due to the carelessness of the appellant, or because the alleged agreement was never made, it is not for the Court to say, but the presumption of law is that people conduct their business according to the rules of business, and where the evidence is conflicting and uncertain, the Court must determine from the acts of the parties, the probability or improbability of their statements. Had Andrade at that time demanded the note tendering the $1,000 gold, and refused to pay until the note was surrendered, it would have been what must have been expected of a business man aware of his rights and zealous to maintain them. As he did not, the Court must naturally presume that he himself did not believe that he was entitled to the surrender of the note. That he is not so entitled, is confirmed by the evidence of the witness, Meyers. Janel sent him several times to Andrade with a bill for $500 in May. Andrade answered that he would see Janel, but not stating that he owed nothing. Meyers was sent again in July to the appellant, when the appellant said that he had seen Janel but did not intend to pay the money because the company had mashed up the boiler that was left on the spot. The evidence of the appellant himself is that, when Meyers presented the bill, he did not say he would fix it up, but said, "it was wrong in Janel to tear up the house," that he told him he "did not know nothing." He admitted that he met Janel on the train in the month of August with Placides and told him that he could not pay him anything. It will be noted that he did not say he should not or wouldn't pay. Janel testified that he met the appellant the last of June or the first of July in Colon and asked him for the $500; that the appellant said, "I am a little embarrassed. We had some talk about the purchase of the boiler for $250. I wrote him a letter about

it some time in June;" that when he asked for the $250 gold, he said that he was embarrassed and asked him "to see if Mr. Candi would purchase the boiler;" that he never said to Janel that he did not owe the $250, United States currency.

As to the first point in the briefs, the burden of proof was on the appellant to show the failure to deliver in full what the contract called for. No rescission of the contract was proposed by the appellant nor demand shown for the articles which are alleged to have been undelivered.

There is evidence that the house was partly demolished on the 25th of September, the date of the contract, and there is also evidence that some of the lumber of the buildings had been removed; but the appellant may have known the former and may not have been damaged in either case.

The conduct of appellant and his failure to establish his defense by a preponderance of the evidence justifies the decision below.

Finding no material error in the record, the judgment of the Court below is affirmed at appellant's costs.

The CHIEF JUSTICE concurred.

Affirmed.

CANAL ZONE *versus* STOUT.

No. 42. No argument or brief.—Decided August 21, 1908.

Appeal by defendant from the Circuit Court of the Second Judicial Circuit of the Canal Zone; Hon. H. A. Gudger, Judge.

T. C. Hinckley, for appellant. *G. M. Shontz*, for the Canal Zone.

F. MUTIS DURÁN, C. J. An information was filed in the Second Judicial Circuit against the defendant, charging him with murder; he was duly arraigned, tried before a jury and found guilty of murder in the first degree.

Motions for a new trial and in arrest of judgment were made and overruled and the defendant was sentenced to be

hung by the neck until dead, on the 20th day of November, 1908.

An examination of the record in this cause reveals no error and as a matter of fact no errors were assigned in this court and no argument had.

The killing was, as shown by the evidence, cruel, cold-blooded and deliberate, and there are no circumstances of extenuation in the case.

Section 282, page 200, of the Laws of the Canal Zone, Act No. 15, provides: "If a judgment against the defendant is affirmed, the original judgment must be enforced." Therefore the judgment of the Second Judicial Circuit is affirmed.

JUSTICE COLLINS concurred.

Affirmed.

CANAL ZONE *versus* O'BRIEN.

No. 43. Submitted August 10, 1908.—Decided September 5, 1908.

Appeal by defendant from the Circuit Court of the Third Judicial Circuit; Hon. F. Mutis Durán, Judge.

THE facts appear in the opinion.

W. H. Carrington, for appellant. *G. M. Shontz*, for the Canal Zone.

H. A. GUDGER, J. This case was tried in the Third Judicial Circuit before His Honor, F. Mutis Durán, Acting Judge of said Circuit. The information charged the defendant with the commission of the crime against nature. He was tried on that charge and found guilty of attempting to commit said crime. Motion was made for a new trial by the defendant, on the grounds (1) that a *prima facie* case had not been made by the Government; and (2) that the verdict was contrary to the law and the evidence. It is contended that the principal witness, Granville Reece, was an accomplice in the crime charged, and, therefore, that his

uncorroborated evidence is not sufficient to justify a conviction.

From the record it is rather difficult to form an opinion on that subject. The facts set forth, however, tend to establish the contrary view. Admitting that he willingly participated in the crime, it seems that his statements were in a substantial manner corroborated by two other witnesses. One of them in an adjoining room saw and heard things which prompted him to report to the police authorities that criminal conduct was going on in the room occupied by the defendant, who at the time, was in the room. When the official came, he found such a state of affairs as shocks one's sensibility.

The evidence of these witnesses shows that a crime had been committed, or attempted, and connects the defendant directly with its commission.

While due weight should be and has been given to this case, and the facts and circumstances have been looked into carefully to see if any injustice has been done the accused, we do not think it is productive of any good to enter into a fuller discussion of a question of such revolting character, or to make a more detailed statement of the evidence.

We affirm the sentence of the court below for the reason that the testimony, in our judgment, is sufficient to justify the finding of the court.

JUSTICE COLLINS concurred.

Affirmed.

CANAL ZONE *versus* HODGSON *et al.*

No. 44. Submitted August 10, 1908.—Decided September 5, 1908.

CONSPIRACY. EVIDENCE OF ACCOMPLICE.

Unless corroborated by sufficient other evidence, the testimony of an accomplice or co-conspirator cannot be used against the other conspirators, after the termination of the conspiracy.

Appeal by defendants from the Circuit Court of the Second Judicial Circuit; Hon. H. A. Gudger, Judge.

THE facts appear in the opinion.

W. H. Carrington, for appellants. *G. M. Shontz*, for the Canal Zone.

LORIN C. COLLINS, J. An information was filed in the Second Circuit, charging the defendants with conspiring to steal from the Panamá Railroad, divers and sundry articles, describing them, kept by it for sale in its commissary at Empire.

On the trial, all of the defendants except Henry Bellamy were found guilty and sentenced for varying terms in the penitentiary. The evidence presented by the Government was as follows:

J. S. Caine testified that he was in charge of the Commissary at Empire; that he had so acted since March 15, 1908; that he was acquainted with the defendants, Robert Hodgson, William Woodruff, Henry Bellamy and James Nightingale; that he did not know Toppen; that Hodgson, Woodruff and Bellamy worked in the commissary, which was owned by the Panamá Railroad. He further testified that the commissary was a store where general merchandise was sold to the employees of the Panamá Railroad Company and the Isthmian Canal Commission; that about ten days prior to May 3, he was advised as to "what had been overheard;" that acting on the information he began to watch; saw Nightingale, cook for the wrecking crew, in the commissary from three to seven times a day; that others

conspired with him; that Nightingale would hang around for half an hour at a time and when he saw that he was watched would buy a pack of cigarettes only; noticed that when Nightingale was in the place one of these men, referring to the other defendants, would be in the front; stopped him once on suspicion but found his purchase all right though he seemed frightened.

On May 2 Hodgson and Bellamy appeared with new shoes on; all goods for employees in commissary have to be charged against pay roll and it is forbidden to buy otherwise; these shoes were not charged to them on their accounts; shoes were the same as sold in the commissary. "Q. Mr. Caine, have you been advised of certain goods found in the possession of these defendants?" "A. Numerous articles found after the arrest of these defendants; of four of them anyhow." Witness recognized same cloth as from the commissary; further said that he had seen all the articles the police took from the rooms of the defendants and that none of them were charged to anyone of them on the commissary's books. He was not asked and did not testify that these other goods came from the commissary; when asked if any employee of the commissary had goods in his possession that came from the commissary, did he come into possession of them unlawfully, he said he could not so swear.

Officer Burns testified that he went to Hodgson's room and that the trunk was opened and everything was examined and that he brought a light blanket, a pair of pajamas and one pair of shoes to the station.

Officer Walston testified that he searched one Sidney Brown's room and it may be inferred from the answer of the officer to a question on cross-examination that stuff was taken from Brown's room, but what, does not appear; he went to tailor shop and got suit that Woodruff said was his and that Caine said was cloth made of cloth such as the commissary sold.

McKen testified that he knew all the defendants except Toppen; that on a Sunday morning in April he saw Nightingale at an early hour, go to the door of Woodruff's room, rap and be admitted; that he did not know what was in

the grip that Nightingale carried; that he did not go into the room.

Witness Ritchie testified that he knew Hodgson, Woodruff and Bellamy and that they worked in the commissary; that on a Sunday morning before stock-taking he heard Bellamy say "they were going to quit because somebody told Caine something—going to make trouble;" that three of them were going to quit.

It was also proven that Hodgson, Woodruff and Bellamy took their time and ceased to work for the commissary on the same Sunday on which they were afterwards arrested.

The résumé given embraces all the evidence in the case with the exception of that of Sidney Brown. It appears that he worked in the commissary during the period of the alleged conspiracy, and was an accomplice and co-conspirator. He was arrested after the arrest of the defendants and then turned state's evidence and gave a full and complete narration of the actings and doings of the defendants in the furtherance and execution of the conspiracy charged in the information.

His evidence would, if admissible against the other defendants, have convicted them and himself of the crime for which they were tried, if it were given credence and a careful study of it reveals no cause for disbelief.

The clean cut issue is made by the defense that the declarations and admissions of one conspirator or accomplice after the termination of the conspiracy cannot be used against his accomplices or co-conspirators unless corroborated by other credible evidence in the case.

Was there corroboration in the case? The defense offered no evidence; therefore we must seek in the evidence for the state for such corroborative evidence. An examination of the evidence fails to reveal any overt act. That is to say, there was no larceny proven. No other witness swore that any articles had been taken in the execution of the conspiracy. No one testified that any article had been missed from the commissary and traced to the possession of the defendants or others. Some one told Caine something as to which the record is silent; and the similarity of goods found in the possession of the accused to other goods handled in the

Panamá Railroad stores, raises the only presumption that an overt act in furtherance of the conspiracy was committed.

The laws of the Canal Zone, section 197, page 188, read: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense or the circumstances thereof."

"The corroboration is not sufficient, if it merely shows the commission of the offense or the circumstances thereof." Then what shall be said of this case where the evidence does not show in corroboration the commission of the offense?

Under the section above, none would contend that the accused should be convicted if Brown were an accomplice. But the Government contends the laws of conspiracy sustain the conviction, and that Brown was not an accomplice and base this on the fact that he was not indicted, and that they used him only as a witness. Unfortunately for this contention, this evidence shows that he not only permitted others to steal and assisted them therein, but stole abundantly himself. These acts made him an accomplice. The Government further contends that great latitude is given in the introduction of evidence in cases of conspiracy. This is true; but such liberality does not change the burden of proof; does not deprive the accused of the benefit of every reasonable doubt, nor justify conviction on no evidence other than that of an uncorroborated conspirator.

Under the universal and elementary rules of evidence, the statements, admissions and declarations of co-defendants, accomplices and conspirators, made and uttered after the commission of the crime, or not in furtherance of the conspiracy, or after the termination of the conspiracy, can be received only against him who made or uttered them.

This position is supported by the Government's brief, by all the text books to which the Court had access and by an unbroken line of decisions.

"Any declarations made by any of the parties in the absence of the others during the pendency of the illegal enter-

prise is not only evidence against himself, but against all the other conspirators."

The defense have cited the following cases also:

"Confessions or statements of one joint offender made after the enterprise is ended, is admissible only against himself."

Parsons v. State, 43 Ga., 197;
Johnson v. State, 48 Ga., 116.

"After the accomplishment or abandonment of the common design, no declaration of a conspirator will affect another; and such declaration should be excluded."

State v. Fredericks, 85 Mo., 145;
State v. McGraw, 87 Mo., 161.

"To make such declarations admissible, they must accompany acts done in pursuance of the conspiracy."

1 Greenl. Ev., 126;
1 Phill. Ev., 94, 95;
2 Whart. Ev., 1206;
2 Stark Ev., 405;
3 Russ. Cr., 150;
Armistead v. State, 22 Texas, 51.

Having disposed of all material contentions, this case is reversed and remanded for further proceedings in conformity to this opinion.

The CHIEF JUSTICE concurred.

Reversed and remanded.

CANAL ZONE *versus* CLARK.

No. 31. Argued January 20, 1908.—Decided February 24, 1908. Re-hearing August 10, 1908.—Final decision September 10, 1908.

JEOPARDY. NEW TRIAL.

A defendant waives the right to plead former jeopardy when he obtains a new trial, since the granting of the new trial places him in the same position as if no trial had been had.

PLEA OF FORMER ACQUITTAL.

If a defendant goes to trial without objection under a plea of not guilty and of former acquittal, a plea of guilty is equivalent to a verdict that there had been no former acquittal.

VERDICT. SURPLUSAGE.

Under a verdict of guilty of larceny and of receiving stolen property, it is held that the second part of the verdict is surplusage; since it is presumed that the judgment was rendered on the verdict of guilty of larceny.

Appeal by defendant from the Circuit Court of the Third Judicial Circuit of the Canal Zone; Hon. Lorin C. Collins, Judge.

The defendant was tried in the lower court on an information charging grand larceny. On November 6, 1906, he was found guilty of receiving and having stolen property in his possession, knowing the same to have been stolen. He was sentenced to five years in the penitentiary. On appeal to the Supreme Court, the judgment of the lower court was reversed and a new trial granted. Canal Zone *v.* Clark, No. 23, page 45.

On the second trial he was arraigned on an information in three counts: (1) for grand larceny; (2) for receiving stolen property, etc.; and (3) for burglary. Defendant first pleaded not guilty to all the counts; then filed a demurrer, which was overruled; then a plea of autrefois acquit and of not guilty to the first count alone. Trial was then had, and, on May 31, 1907, defendant was found guilty under the first and second counts. On June 6, 1907, he was sentenced to five years in the penitentiary. Appeal was again taken to the Supreme Court, counsel laying special stress on their

contention of former acquittal and of erroneous verdict, the defendant having been convicted of more than one offense. This court affirmed the sentence of the lower court on February 24, 1908. On March 3, 1908, defendant asked for a re-hearing of the case. The petition was granted and the re-hearing had on August 10, 1908. On September 10, 1908, the court again affirmed the decision of the lower court.

W. H. Carrington and *Sam B. Dannis*, for appellant. *G. M. Shontz*, for the Canal Zone.

H. A. GUDGER, J. Ebenezar Clark, the prisoner, was tried by the Judge of the Third Judicial Circuit on a charge of larceny, and found guilty, and appealed to the Supreme Court. The appellate court granted the prisoner a new trial.

At the second trial, the information included the original charge of larceny and, in addition, a count for "receiving," and also a count for burglary. He was tried and found guilty at the second trial on the first and second counts in the bill. The attorney for the defense takes the position that the prisoner was once in jeopardy and, therefore, cannot be again tried for the same offense. Section 217 of the Code of Criminal Procedure (Act No. 15 of the Laws of the Canal Zone) is as follows: "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the information." Section 222: "The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which he was before the information was filed." In the Cyclopedia of Law and Procedure, Vol. 12, beginning on page 278, we find the following: "When a new trial is granted on motion of the defendant, and the verdict and conviction set aside, the defendant has thereby waived his right and is estopped to plead the former conviction as a bar to a new indictment." "The accused is estopped to plead a prior conviction when his conviction has been reversed for error on an appeal or writ of error brought by himself." "A defendant waives his

right to plead former jeopardy by appealing for a new trial. When, therefore, a new trial is granted in the appellate court and he is reindicted or tried on the original indictment, he cannot plead the conviction which was reversed on appeal as a bar to the prosecution." The Supreme Court of the United States has specially passed on this point, and in the case of Simmons *v.* United States, 142 U. S., it is held that where a jury is discharged during the trial, and the defendant afterwards placed on trial for the same offense before another jury, he is not twice placed in jeopardy within the meaning of the fifth amendment to the Constitution of the United States. In Thompson *v.* United States, 155 U. S., 271, it is distinctly held that the court may, when in its opinion there is a necessity for so doing, or when the ends of justice warrant such action, discharge a jury from giving a verdict and order another trial of the case before another jury, and that in such case the defendant is not thereby placed twice in jeopardy.

Again, it is urged that the defendant is entitled to a discharge for the reason that the court found him guilty of larceny and, at the same time, of receiving stolen goods, knowing them to have been stolen. This point does not seem to be tenable for the reason that the court found the defendant guilty of larceny and apparently sentenced him upon that finding and that finding only, and, therefore, at best, that part of the verdict which refers to the second count would be mere surplusage. The record shows clearly that the defendant was in no way affected by that part of the verdict complained of by his attorneys. This view of the case is strengthened by the fact that the evidence fully warranted the defendant being found guilty of larceny and the sentence imposed by the court. Viewing the whole record and all the evidence contained therein, together with the exceptions made by the defendant, we are of opinion that the defendant has had a fair and impartial trial, and that there is no error in the record of which he can justly complain. The judgment of the court below is therefore affirmed.

The CHIEF JUSTICE concurred.

The following is the opinion rendered after the re-hearing:

H. A. GUDGER, J. This case was considered and an opinion rendered at the April term of this court. Motion was made by the attorneys for the defendant to reopen the question for the alleged reason that the Court had inadvertently overlooked some of the main contentions made by them at the hearing. This motion was allowed. The points for consideration at this time are the demurrer, the plea of former acquittal, and as to whether or no the evidence is sufficient to justify the action of the court in its conclusions.

The record in the case shows that the defendant was arraigned on the 2d day of April, 1906, and that he entered a plea of not guilty on each of the three counts contained in the information. It also shows that on the same day he filed the demurrer referred to, as well as the plea of former acquittal. The record fails to show that the plea of not guilty as entered was withdrawn for the purpose of filing the other two pleas in question, or that a request was made to the court for this purpose. It is a fact, however, agreed to by all the attorneys, that when the plea of not guilty was entered it was agreed and understood that the counsel for the defendant should have the right to file such other motions or pleas as they might deem necessary. The record also shows that the demurrer was overruled by the court, but does not show that the court, at the close of the Government's case, while he overruled the demurrer and refused to require the Prosecuting Attorney to elect as to which count he would go for, did announce that so far as the count for burglary was concerned, no evidence need be offered on that, as that count would be eliminated. It is agreed by all the attorneys to the action that this was done by the presiding judge. As the demurrer and the question of election referred specially to the third count in the bill of information, the action of the court in eliminating this corrected any error that might have been committed and left it for the defendant to answer only as to the first and second counts in the bill of information. It will be noted further that, even with the three counts in the bill of information, and the third charging burglary, yet, as all the facts and circumstances show, it was with regard to one and the same transaction and therefore the defendant had knowledge with regard to the

same and was not put to any inconvenience in preparing to meet the issue of larceny. We do not think, under these circumstances, that there is such substantial error as would justify a reversal of the action of the presiding judge.

A paper was filed by the counsel for the defendant in which he pleaded former acquittal on the first count in the bill of information, and not guilty to the same count. The complaint is that this plea of former acquittal was not passed on by the court. After filing these pleas, the case was continued until the next regular court day and from then until the 17th day of May, and, by special stipulation, until the trial day, the 31st of May. No attention seemed to have been paid to the plea of former acquittal. This plea was based on a former trial in the same case before the then presiding judge, and the defendant went to trial without objection with both pleas pending. It is a reasonable presumption that both pleas were tried and that the verdict rendered of guilty was equivalent to a verdict that the defendant had not been formerly tried and acquitted.

The defendant's counsel makes a strenuous effort with regard to his contention that, taking all the evidence adduced at the trial to be true, it was not sufficient to justify the court in rendering a verdict of guilty. In reading the record we are impressed with the fact that the evidence shows that a crime was committed, that goods similar to those lost were found in the possession of the defendant; that certain statements were made by him strongly tending to connect him with the crime, and that many circumstances pointed to him as the person who was guilty of the offense. There was, therefore, evidence upon which the presiding judge could act, and it is only a question as to the weight to be given to the testimony.

It is not usual for an appellate court to interfere under such circumstances, except for a very grave reason. The jury or the presiding judge at the hearing has the advantage of seeing the witnesses, noting their demeanor, observing all circumstances connected with their surroundings, including the degree of their intelligence, the manner in which they conduct themselves on the witness stand, and, hence, is better able to give proper weight to the testimony than

those who can only read the cold statement of facts without any knowledge with regard to the conduct of the witnesses, or their intelligence, or apparent desire to speak frankly and truthfully.

Being of opinion that the evidence was sufficient to justify the court below in finding a verdict of guilty, and finding no substantial error in the record, the action of the court below is affirmed.

The CHIEF JUSTICE concurred.

Affirmed.

CASES DECIDED WITHOUT OPINION FILED.

No. 22. JOHN SEYMOUR *v.* ANTONIO ANDRADE. Appeal from Circuit Court of the Second Judicial Circuit. Argued January 21, 1907. Decided May 6, 1907. Judgment of lower court affirmed by the Chief Justice, Justice Collins dissenting. *J. M. Keedy* and *G. M. Shontz*, for plaintiff. *T. C. Hinckley* and *Oscar Terán*, for defendant.

No. 27. CANAL ZONE *v.* ALEX. SMITH. Appeal by defendant from the Circuit Court of the Second Judicial Circuit. Argued April 8, 1907. Decided May 6, 1907. Reversed and remanded, following opinion in *Canal Zone* v. *Colinas*, *No.* 26. *W. H. Carrington*, for appellant. *G. M. Shontz*, for Canal Zone.

No. 37. AMERICAN BAZAAR *v.* KEE CHONG CHANG ET AL. Appeal by defendants from the Circuit Court of the Second Judicial Circuit. Argued April 22, 1908. Decided June 16, 1908, following opinion in *Maduro-Lupi Co.* v. *Same*, *No. 38.* Reversed and remanded. *Oscar Terán*, for appellant. *T. C. Hinckley*, for respondent.

No. 45. CANAL ZONE EX REL. ANTONIO ANDRADE *v.* E. M. GOOLSBY, CLERK OF CIRCUIT COURT, ETC. September 19, 1908. Application for writ of mandamus. No answer filed and no contest made by respondent. September 21, 1908. Peremptory writ issued. *Hinckley and Ganson*, for relator.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT.

No. 1. CANAL ZONE *v.* OLI NIFOU. Appeal by defendant from the Circuit Court of the Third Judicial Circuit. July 10, 1905. Dismissed, with costs, on motion of appellant. *Gilbert F. Little*, for appellant. *J. M. Keedy*, for the Canal Zone.

Nos. 2 and 3. CANAL ZONE *v.* JOSIAH BARNETT. Appeal by defendant from the Circuit Court of the Third Judicial Circuit. July 10, 1905. Dismissed, with costs, on motion of appellant. *Gilbert F. Little*, for appellant. *J. M. Keedy*, for the Canal Zone.

Nos. 4 and 5. CANAL ZONE *v.* FELIPE GONZALES. Appeal by defendant from the Circuit Court of the Third Judicial Circuit. July 10, 1905. Dismissed, with costs, on motion of appellant. *Gilbert F. Little*, for appellant. *J. M. Keedy*, for the Canal Zone.

Nos. 6, 7 and 8. CANAL ZONE *v.* J. S. LEVY. Appeal by defendant from the Circuit Court of the First Judicial Circuit. July 10, 1905. Dismissed, with costs, on motion of appellant. *Gilbert F. Little*, for appellant. *J. M. Keedy*, for the Canal Zone.

No. 33. PRUDENCIO TRICOCHE *v.* A. ROME. Appeal from

the Circuit Court of the Second Judicial Circuit. February 24, 1908. Dismissed by agreement of both parties. *Oscar Terán*, for plaintiff. *S. B. Dannis*, for defendant.

No. 32. CANAL ZONE *v.* H. G. MACMURRAY. Appeal by defendant from the Circuit Court of the First Judicial Circuit. April 13, 1908. Dismissed on motion of appellant. *S. B. Dannis*, for appellant. *G. M. Shontz*, for the Canal Zone.

No. 41. CANAL ZONE *v.* GEO. D. TROTMAN. Appeal by defendant from the Circuit Court of the Second Judicial Circuit. September 11, 1908. Dismissed on motion of appellant. *S. B. Dannis*, for appellant. *G. M. Shontz*, for the Canal Zone.

MISCELLANEOUS.

IN THE MATTER OF FRANK J. HUEY, PETITIONER. No. 174, Criminal Docket, Circuit Court, First Judicial Circuit. Petition for writ of *habeas corpus* filed June 17, 1907. Petitioner released June 19, 1907. *T. C. Hinckley*, for petitioner. *G. M. Shontz*, for the Canal Zone. By order of the Supreme Court of August 10, 1908, the opinion in this cause is included among the official reports.

H. A. GUDGER, J. On the 17th day of June, 1907, a petition, duly verified by affidavit, was presented to the undersigned on behalf of Frank J. Huey, the petition stating that he, the relator, was, at the time of the filing of the said petition, "wrongfully and unlawfully imprisoned, detained, confined and restrained of his liberty by one George R. Shanton, Chief of Police of the Canal Zone, in the common jail at the city of Ancón, Canal Zone." In said petition the further allegations are made: "that the only pretext or cause of such arrest and detention is by virtue of a cablegram sent from the American Minister at Quito, Ecuador, to the American Minister at Panamá, requesting the detention of the petitioner herein, and that the same is not by virtue of any warrant or information properly filed against the petitioner herein, nor has any information been filed against the petitioner herein, nor is he at the present time so held in custody by virtue of any warrant, information or law having any force or effect in the Canal Zone."

The petition was granted and a writ of *habeas corpus* directed to be issued to the Marshal, who is likewise Chief of Police of the Canal Zone, returnable the 18th day of June, 1907, on which day the Marshal produced the prisoner before the undersigned judge, and made return to the writ in the following words:

"First endorsement. Office of the Marshal, Ancon, Canal Zone, June 18, 1907. Respectfully returned to the Presiding Judge of the First Judicial Circuit.

"Prisoner Frank J. Huey, referred to in the within writ, and

who was arrested by this Department about 11 o'clock A. M., yesterday, the 17th instant, as per true copy of the attached authority of the Head of the Department of Civil Administration, is herewith produced.

"(Signed) GEO. R. SHANTON, Marshal."

"The attached authority of the Head of the Department of Civil Administration" is in the following words:

"United States of America, Isthmian Canal Commission, Canal Zone, Isthmus of Panama, June 16, 1907. Sir: The American Minister at Panama has received the following cable from the American Minister at Quito, Ecuador: 'Quito—Amlegation, Panama: Auditor Huey, G. & Q. Railway, absconded with funds railway. Probability by steamer arriving Panama next Friday. Detain him. Advise me. Will forward papers. FOX.'

"In his advice of the receipt of this cable, the Minister requests that Huey be arrested upon his arrival on the Isthmus, and held pending the receipt of the necessary papers for his extradition.

"You are, therefore, directed to arrest Huey, if he comes within the jurisdiction of the authorities of the Canal Zone, and detain him in your custody until you are instructed to deliver him to the authorities of Ecuador.

"Make an early report of your action hereunder.

"Respectfully,

"(Signed) JO. C. S. BLACKBURN,
"*Head of Department of Civil Administration.*

"CAPTAIN GEORGE R. SHANTON,
"*Chief of Police, Ancon.*

"A true copy: (Signed) GEO. R. SHANTON, Chief of Police."

At the hearing the petitioner was represented by T. C. Hinckley, and the Chief of Police by G. M. Shontz, Prosecuting Attorney for the Canal Zone.

No complaint, warrant, document or paper of any kind other than those to which reference has been made herein was before the court, and no evidence was introduced by either side, other than the above papers, together with two cablegrams and an affidavit hereinafter treated.

In the argument of the Prosecuting Attorney for the Canal Zone, it was claimed that the prisoner was held under treaty stipulations between the governments of the United States and of Ecuador, and that the matter of his detention cannot be gone into by the courts of the Canal Zone, nor could they

inquire into the regularity and lawfulness of the proceedings by the writ of *habeas corpus*.

The attorney for the petitioner insisted upon an immediate discharge, and in support of his contention assigned (1) that under international law there is no authority to extradite, and that there can be no authority so to do in the United States except as provided by statute or treaty; and (2) that the arrest of a person upon a telegraphic communication from another State reciting that a warrant and the proper papers have been issued, is unauthorized, and the accused is entitled to his discharge on a writ of *habeas corpus*.

After hearing argument on these and other propositions of law, the case was taken under advisement until nine o'clock the next morning, when the attorney for petitioner presented an affidavit purporting to set forth the following facts: (1) that the petitioner is a citizen of the United States; (2) that petitioner had never been an official of the Republic of Ecuador; (3) that petitioner had never handled any money of the Republic of Ecuador; (4) that the G. & Q. Railway Company is an American corporation; and (5) that he left Ecuador on June 11, 1907.

This affidavit, though filed with the papers, forms no part of the record, and was not considered in arriving at a decision in the case.

And also, after argument, the Prosecuting Attorney offered the following paper:

"Executive Office, June 18, 4 p. m. American Legation telephones that Minister Squiers has received the following cable from Minister Fox, at Quito. 'Attorneys for railroad advise me that extradition papers will go forward by next steamer from Guayaquil.'"

Whereupon the court took a recess to 2 o'clock P. M. for further advisement, at which time an order was made discharging the prisoner and reserving the right to prepare a written opinion.

Upon the foregoing record the question arose whether the prisoner should be discharged or remanded to custody to be detained until the marshal should be instructed to deliver him to the authorities of Ecuador.

The arrest and detention of the petitioner having been

made in order that he might be delivered to the authorities of the Republic of Ecuador by virtue of and in conformity to a treaty existing between that Republic and the United States of America, it seems proper to consider as to whether or not the laws of the United States have been complied with.

Section 5270 of the Revised Statutes of the United States prescribed the procedure necessary in such cases, and apparently intends to set forth and, in the opinion of the court, does set forth the proper method of procedure. This is as follows in the order named:

(1) There must be a treaty relation between the United States and the country making the demand;

(2) There must be a complaint upon oath charging an extraditable crime committed in the demanding country;

(3) The judicial officer shall issue his warrant upon the oath above referred to for the arrest of the accused.

These are the preliminary and essential steps necessary to bring a fugitive from justice before a court, after which the court is enjoined by the statute to the following further steps:

(4) To hear all the evidence adduced;

(5) If the evidence produced at the hearing is sufficient, in the opinion of the judge or other judicial officer, to warrant such action, the prisoner shall be committed to custody;

(6) The judicial officer shall certify the testimony taken before him to the Secretary of State;

(7) From this testimony so certified a warrant may issue, ordering the delivery of the prisoner to the agents or proper authorities of the demanding Government for extradition.

Numerous authorities might be cited to sustain the position that no person charged as a fugitive from justice can be lawfully arrested and held, except the preliminary steps are first taken, which are the complaint on oath charging a crime, as contemplated by this statute, and a warrant of arrest issued by a competent judicial officer.

"The arrest and detention of a person cannot be justified against a petition for *habeas corpus* by a telegram from the authorities of another State, stating that they have a warrant for his arrest, a copy of which is included in the message, and that

they have started after him with proper papers—at least when no judicial inquiry or commitment has been made."

Simmons *v.* Van Dyke, 26 L. R. A. 34 (Indiana Supreme Court.)

"Under Revised Statutes U. S. 5270 providing that whenever there is a treaty or convention for extradition, the officer designated 'may upon complaint made under oath charging any person * * * issue his warrant for the apprehension of the person so charged,' a sufficient complaint on oath is essential to the jurisdiction, and a warrant issued without it is void."

Ex parte McCabe, 46 Federal Reporter, 363.

"Every citizen of the United States being secured by the Constitution against unreasonable arrest, and magistrates being prohibited from issuing warrants except on probable cause, supported by oath or affirmation, the President cannot order the arrest of the master of an American vessel and his confinement for trial upon a communication from the British Minister, accompanied by copies of depositions taken before a justice of the peace of the island of Antigua, charging him with the murder of a British subject on the high seas."

2 Op., 267, Berrien, 1829.

It is not contended that two sovereign governments might not, if they so chose, dispense with the fundamental prerequisites to an arrest, namely: the complaint under oath and the warrant authorizing such arrest; nor is it needful to consider the question as there exists no such stipulations in the treaty between the United States and Ecuador.

In the case before us, there was no complaint filed under oath, and no warrant for the arrest or detention of the prisoner issued as provided by law, and though a week has passed since the prisoner was put under surveillance and afterwards arrested, there had been no proceedings instituted against him.

Referring to the point made in regard to the jurisdiction of the court in this matter, there might have been considerable force in the contention if regular proceedings had been commenced under the statute above referred to. But it is clear to the court that in the absence of such preliminary proceedings, the position is not tenable.

Again, it is contended that the prisoner is held under treaty stipulations between the Governments of the United States and of Ecuador. By reference to that treaty, which

is found on page 246 of "The Compilation of Treaties in force in 1904," we find in Art. 2 the crimes for which an extradition can be had. This list does not, in the opinion of the court, include the crime which the prisoner is alleged to have committed. The nearest it comes to it is the sixth clause of the treaty which recites the embezzlement of public property by a public officer.

The cablegram in question shows that the defendant was the auditor of the G. & Q. Railway Company. This railroad is a corporation and, so far as the facts disclose, has no connection with the Government. If there were any doubt as to this being true, that doubt would be relieved by a second cablegram which has been placed in evidence and which says: "Attorneys for R. R. advise me, etc.," as quoted above.

The parties desiring this arrest, having undertaken to state the crime and the nature of the same, are supposed to have stated it as strongly as the facts would warrant.

"The term 'public officers' in the treaty of 1843 between the United States and France, or, as it stands in the French copy, 'dépositaires publics,' signifies officer or depositaries of the Government only, and does not comprehend officers of a railroad company, notwithstanding the latter was authorized and subventioned by the French Government."

8 Op., 106, Cushing, 1856.

It is now necessary to consider the question as affected by the laws of the Canal Zone. Under these laws, a party within this territory can be arrested and detained either (1) on a warrant issued, having as its basis an affidavit charging a public offense, or (2) where a party is caught in the commission of certain public offenses.

Where a party is arrested in either case above set forth, it is the duty of the officer or party making the arrest, as prescribed by law, to take the prisoner before the proper judicial officer that the charge may be investigated. In case the arrest is without a warrant, the officer or other person must file a written complaint on oath charging the crime.

The above is in conformity with the declaration of the President of the United States in his letter of 1904, relative to the Canal Zone, in which he points out certain inalienable

rights as appertaining to the inhabitants thereof; among other things saying that "no man shall be deprived of life, liberty or property except by due process of law." This process of law, given as a right to every person within this strip of territory controlled by the United States and known as the Canal Zone, is that an affidavit charging a crime shall be filed and a warrant shall be issued by a committing magistrate, before an arrest can be made. The committing magistrates in the Canal Zone are the judges of the Supreme Court, the judges of the Circuit Courts, the District Judges and the Prosecuting Attorney.

Title XIV. of Act No. 15 of the Canal Zone Laws seems sufficiently explicit in matters relating to extradition between the Canal Zone and the United States, and *vice versa*, but this title is confined entirely to the United States and the Canal Zone, and does not embrace within its scope extradition relations with foreign countries; and indeed and in truth it would seem that such was not contemplated when read in connection with Section 5 of Act No. 14, which reads as follows:

"No person shall be arrested for any crime or offense unless such crime or offense is expressly declared in this code, except for crimes and offenses against the laws of the United States applicable to the Canal Zone, Isthmus of Panama, and the enactments, laws and resolutions of the Isthmian Canal Commission, and laws enacted by the Congress of the United States for said Canal Zone."

Considering the conditions on the Isthmus and the circumstances surrounding this case, and especially the channel through which the cablegram came from Quito, the authorities of the Canal Zone did their full duty in temporarily holding the prisoner. This left two courses open—one for a representative of the demanding Government, as an illustration its consul in Panama, within one mile of the place of detention, to take the preliminary steps imperatively demanded by the statute.

"A complaint before a commissioner in an extradition case, verified by the consul of a foreign Government, in which he charges the offense properly, is sufficient, if made by him officially, although he does not make the averments on his personal knowledge of the facts." In re Francois Farez, 7 Blatch., 345.

In the absence of these preliminary steps, no other court having acquired jurisdiction, the only question before this court is not whether the prisoner shall be detained, but whether or not, at this moment, he is lawfully held. From the proof, the Court is of opinion that, by the plain mandates of the law, for the reasons set forth herein, the prisoner is entitled to be discharged and go hence without day, and an order to this effect has been signed and recorded.

INDEX

CERTIORARI.

When writ will be granted.
Requirements of petition. *Calderón* v. *Coquard*, 32.

CESSION OF PROPERTY.

See BANKRUPTCY.

CONCESSION.

See GAMBLING.

CONSPIRACY.

Evidence of co-conspirator.
Cannot be used against other conspirators after termination of the conspiracy, unless corroborated by other testimony. *Canal Zone* v. *Hodgson*, 123.

CONTRACT.

1. *Admission as proof.*
Cannot be objected to by plaintiff who has filed contract with his pleading. *Andrade* v. *Seymour*, 13.

2. *Cancellation of contract.*
Where return of specific property is prayed for, a judgment for the money value of the property is error. *Achurra* v. *Olivares*, 6.

3. *Law governing contracts.*
Contracts are governed by the law of the State where made. *Boilleau* v *Barril*, 21.

4. *Nullity of contract.*
The nullity of a contract cannot be set up by a guilty party to the contract. *Andrade* v. *Seymour*, 13.

COURTS.

See JURISDICTION, 2.

DAMAGES.

Exemplary damages.
Cannot be allowed in Canal Zone. *Melendez* v. *Oil Co.*, 106.

DUE PROCESS OF LAW.

Defined.
As the general law of the land. *Canal Zone* v. *Coulson*, 50.

EJECTMENT.

1. *Mesne profits.*
When a possessor in good faith must account for mesne profits. *Acebo* v. *Garavel*, 87.

EMBEZZLEMENT.

See JURISDICTION.

EVIDENCE.

See CONSPIRACY.

EXCEPTIONS.

FORGERY.

FORMER ACQUITTAL.

See PLEADING, 3.

GAMBLING.

HABEAS CORPUS.

IMPROVEMENTS.

See EJECTMENT, 2. PUBLIC LANDS, 1.

INFORMATION.

See FORGERY, 1. VARIANCE, 1, 2.

INJUNCTION.

See PUBLIC LANDS.

INTENT.

See JURISDICTION, 1. LARCENY, 2.

JEOPARDY.

New Trial.

The granting of a new trial does not place defendant twice in jeopardy. *Canal Zone* v. *Clark*, 128.

JUDGMENT.

1. *Notice of rendition of judgment.*

Need not be served upon parties. *Calderón* v. *Coquard*, 32.

2. *Time of rendition.*

It is not error to render judgment immediately after verdict if no objection is made by defendant. *Canal Zone* v. *Wright*, 39.

JURISDICTION.

1. *Intent.*

When the intent to embezzle existed in the Canal Zone but the actual conversion occurred in Panamá, the Canal Zone has jurisdiction. *Canal Zone* v. *Hardeman*, 82.

2. *Transfer of jurisdiction.*

From courts of Panamá to courts of Canal Zone. *Calderón* v. *Coquard*, 8.

JURY.

Trial by.

Not guaranteed to the Canal Zone by the Constitution of the United States. *Canal Zone* v. *Coulson*, 50.

LARCENY.

1. *Included offenses.*

Receiving stolen goods not included in larceny. *Canal Zone* v. *Clark*, 45.

2. *Intent.*

Presumption of larcenous intent. *Canal Zone* v. *Wright*, 39.

LAWS OF CANAL ZONE.

Act No. 4.
Held to be valid. *Canal Zone* v. *Christian*, 1.

MANDAMUS.

Essentials of petition.
The petition for a writ of mandamus must be very explicit, must show there is no other remedy and must be verified. *Seymour* v. *Andrade*, 19.

MESNE PROFITS.

See EJECTMENT, 1.

NEW TRIAL.

See JEOPARDY.

NOTICE.

See APPEAL, 3. JUDGMENT, 1.

NOVATION.

Proof of.
A novation may be proved by other evidence if it is not possible to produce the note. *Boilleau* v. *Barril*, 21.

PLEADING.

1. *Stamped paper.*
Not required in Canal Zone. *Andrade* v. *Seymour*, 13.

2. *Verified answer.*
An answer need not be sworn to. *Idem.*

3. *Former acquittal.*
With a plea of former acquittal and one of not guilty, a verdict of guilty only is equivalent to a verdict that there had been no former acquittal. *Canal Zone* v. *Clark*, 128.

POWER OF ATTORNEY.

1. *Compensation of attorney.*
Manner of fixing. *Lavergneau* v. *Janel*, 30.

2. *Manner of granting.*
A power of attorney may be granted by a public instrument or by a memorial addressed to the court. *Calderón* v. *Coquard*, 32.

3. *Renewal or continuance.*
May be implied by acquiescence in acts of attorney after the expiration of the term fixed in the power of attorney. *Lavergneau* v. *Janel*, 30.

PRESCRIPTION.

See PUBLIC LANDS, 5.

PROMISSORY NOTE.

Surrender of note.

When not demanded, raises presumption that note was not paid in full. *Janel* v. *Andrade*, 117.

See NOVATION.

PUBLIC DEED.

1. *Purchase for use of another.*

A recorded declaration of such a purchase cannot cancel the deed and transfer title. *Acebo* v. *Garavel*, 87.

2. *With agreement of redemption.*

Whether rescinded by subsequent deed that extends term for redemption. *Perrenoud* v. *Salas*, 24.

3. *Same; tender of purchase money.*

If not made, deed becomes absolute at expiration of term for redemption. *Idem.*

PUBLIC LANDS.

1. *Improvements.*

A possessor in good faith is entitled to the value of the improvements he has made upon public lands. *United States* v. *Andrade*, 64.

2. *Injunction against damage.*

Occupant of public lands without title cannot enjoin public employés from causing damage to the improvements. *Andrade* v. *Panamá R. R. Co.*, 76.

3. *Title by cultivation.*

Method of acquiring title by this means. *United States* v. *Andrade*, 64.

4. *Title by occupation.*

Can be obtained only of things that have no owner. *Idem.*

5. *Title by prescription.*

Of public land, cannot be acquired. *Idem.*

REAL PROPERTY.

1. *Servitude.*

Conveyance or extension of a servitude, how made. *Melendez* v. *Oil Co.*, 106.

2. *Title by adverse possession.*

Cannot be acquired as long as tenants of the original owner are in possession. *Cruise* v. *Allen*, 36.

3. *Title retained, possession transferred.*

This results in a voluntary servitude. *Melendez* v. *Oil Co.*, *106.*

RECEIVING STOLEN PROPERTY.

SERVITUDE.

STAMPED PAPER.

TENDER.

TIMEBOOKS.

TITLE.

TRESPASS.

UNITED STATES OF AMERICA.

VARIANCE.

VERDICT.

See VARIANCE, 2.